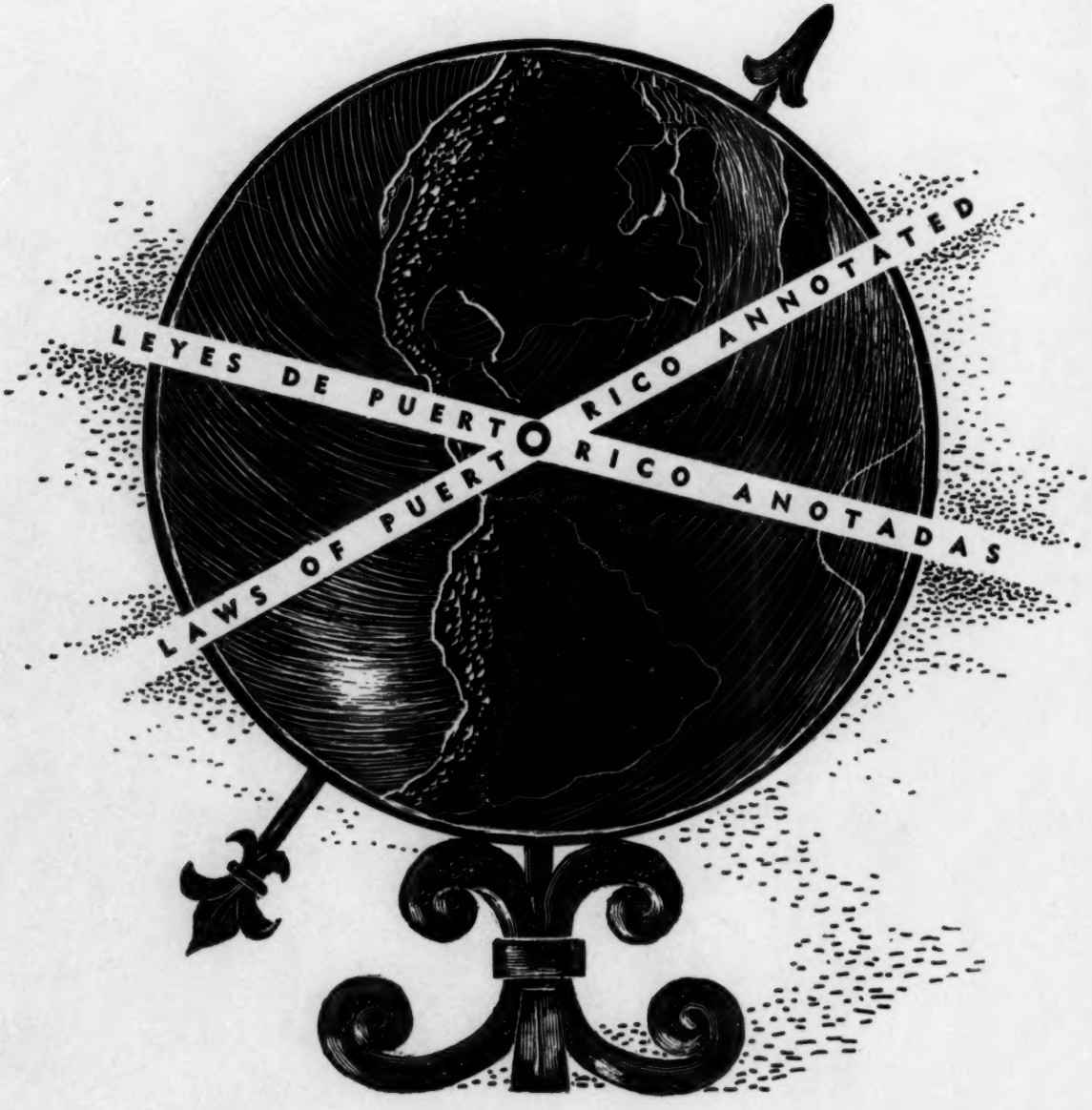
American Bar Association Journal

MARCH 1955 • Volume 41 • Number 3



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Our New Cover

For the first of our new series of covers, we have chosen a line drawing of the great Athenian philosopher Socrates (470?-399 B.C.). Called "the most righteous man of the whole age" by his friend and disciple Plato, Socrates devoted most of his life searching for an answer to the question "What is justice?" Socrates' thirst for justice, along with his wisdom, his great moral and physical courage and his patriotism exemplify the highest ideals of the legal profession. The drawing is by Charles W. Moser, of Chicago.

March, 1955

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East Sixtieth Street, Chicago 37, Illinois
Entered as second class matter August 25, 1920, at the Post Office at Chicago, Illinois, under the act of August 24, 1912.
Price per copy, 75¢; to Members, 50¢; per year, $5.00; to Members, $2.50; to Students in Law Schools, $3.00;
to Members of the American Law Students Association, $1.50.
Vol. 41, No. 3. Changes of address must reach the JOURNAL office five weeks in advance of the next issue date. Be sure to give both old and new addresses.

The President's Page

Loyd Wright

■ In traveling around the nation visiting with the officers and members of local and state associations, there are often suggestions made that have great merit but which for some reason or other do not necessarily lend themselves in entirety to the national association.

Recently I visited with Irwin S. Rhodes, of Cincinnati, who is chairman of the committee of the Cincinnati Bar Association entitled "Committee on Preservation of Historical Documents". Mr. Rhodes has done a great deal of research in legal documents kept in the files in various types of offices throughout the states. He states that these public records are not being preserved. In many instances they are not kept in fireproof buildings. In most instances they are simply disintegrating due to age and careless handling by great numbers of users. In too few instances has he found an interest in their preservation, and I do not feel that the life span of these documents, important as they are in the history of our profession, should be measured only by the quality and toughness of the paper on which they were written.

And Mr. Rhodes is not alone. The Director of the National Archives and Records Service urges that something be done before these basic sources are lost or become quite useless. And I am not speaking solely of official state and local records. Here is a statement made by the Director of the National Historical Publications Committee:

> In thinking of legal records, I have in mind not only records of the courts and of officers concerned with law enforcement. I have in mind also the valuable files that accumulate in the offices of attorneys. The latter are personal papers, but some of them are important in supplementing the more formal documents that constitute the official records.

The American Bar Association is now planning for the preservation of its own records and we hope shortly to be able to announce the purchase of the equipment necessary to reproduce the records of the Association and its out-of-print and scarce publications on microfilm or microcard.

But the state and local official documents, the other important historical papers in offices throughout the country are in your cities and in your towns. They are there now, but how long will they remain? Destruction such as caused by fire in Orange County, Virginia, Morgantown, West Virginia, and Champaign County, Ohio, can be averted in other localities if photostatic or microprint copies are made and stored in proper depositories. Disintegration through daily use can be avoided by making master copies from which others can be reproduced for daily use.

I do feel that the state and local bar associations should become active in the program to preserve for future generations these documents necessary for a clear and unequivocal understanding of the historical corroboration of American ideals and principles that led to our form of government.

Not long ago, at Lancaster, Pennsylvania, Mr. Rhodes advises that he pulled down a will book and he opened it to the first pages which contained the wills of John Bowman and a Widow Ferree, worthy characters in the settlement of Pennsylvania by the Mennonites and the Huguenots in the early 1700's, only to have what is left of the pages fall apart in his hands. He placed the pieces in an envelope and advised the clerk. Later, when the clerk was asked for a certified copy of what was left, he reported that he had nothing left.

This is an example of what we want to avoid. The originals of these historical papers and documents should be copied and carefully stored for the future. With the new and inexpensive available methods of reproduction and record preservation—methods which have a wide usage and general acceptance in business today due to savings in storage space and ease of handling in addition to the preservation factor, I can see no great obstacles to such a program on the part of local and state bar associations.

It needs some local interest in your cities. We do plan to proceed with our program here at the Bar Center. Given the equipment and the personnel, we hope to be able to be of some assistance to you in your planning. It may be feasible, through the use of traveling teams of technicians, to assist you in your actual reproduction program.

Certainly our legal history as contained in these documents and papers should be preserved for the future.

American Bar Association Journal

the official organ of the

AMERICAN BAR ASSOCIATION

published monthly

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the following Sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. Dues for the Section of Administrative Law, the Section of Antitrust Law, the Section of Labor Relations Law and the Section of Patent, Trade-Mark and Copyright Law are $5.00 a year; dues for the Section of Taxation are $6.00 a year; dues for all other Sections are $3.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East Sixtieth Street, Chicago 37, Illinois.

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■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Religio Juridici — "A Fine Editorial"

■ The first thing I turn to when I get the AMERICAN BAR ASSOCIATION JOURNAL is the editorial page. The editorial "Religio Juridici" [December issue, at page 1064] is one of the finest I have read in many a day. I want to congratulate the American Bar Association and you for this fine work. . . .

CHARLES LEVITON
Chicago, Illinois

What Are "Democratic Institutions"?

■ Mr. McCauley's article on the American courts in Germany in the December issue is superb. He is to be heartily congratulated.

Most reluctantly, I must point out an unfortunate choice of words at the very end of his article which might easily be misunderstood. In discussing the policy decision to incorporate American procedural techniques in the military courts, rather than following Continental procedure, he says: "It was decided that by example we could show one *democratic institution,* namely our courts, in operation even in occupied territory." [Italics added].

Will this be read by our friends in Switzerland, Sweden, Austria, Holland and other enlightened European countries to mean that *only* our courts and our procedural system are to be called "democratic institutions", and that by necessary inference the courts and procedural methods under the Continental system are "undemocratic"?

I would have been much happier had Mr. McCauley written this sentence to read: "It was decided that by example we could show one *American institution,* namely our courts, in operation even in occupied territory, judging the citizens of the vanquished nation just as we judge our own citizens at home."

I am sure that is what Mr. McCauley intended. If it were so phrased, it would avoid any possibility of an unintended aspersion on the legal systems of the many passionately democratic countries of Western Europe, which practice under the Continental system.

PHILIP W. AMRAM
Washington, D. C.

The Presumption of Innocence in German Courts

■ The article on page 1041, December, 1954, issue of the AMERICAN BAR ASSOCIATION JOURNAL . . . seems to be admirably well informed and is most interesting.

My only objection is against the statements on page 1103 first column, which contain some misunderstandings on the part of the author. The German Penal Code is based on exactly the same presumption of the accused being innocent until proved guilty as is the American criminal procedure. The fact that the prosecutor is sitting at the judge's table (more correctly, he is sitting around the corner at the narrow end while the judges sit behind the table) has its reason in the German legal hierarchy. Both the judges and the public prosecutor are incorporated in an official career while the counsel for the defence is a member of a free profession. On the other hand, the judge is under the German constitution completely free and independent, and only subject to the law, same as in every civilized nation, while the public prosecutor takes instructions from his superior authority. Needless to say that judge and prosecutor do not have the slightest contact during the whole course of the trial.

Having studied law in the United States and knowing a little about the English legal system, the seating arrangement in a German court, although customary to the average German spectator, has begun to strike me, too, as being unfortunate. I can very well understand that an observer who is not acquainted with the background of the German set-up should come to the conclusions that are implied in the above mentioned article. The actual difference between an Anglo-Saxon court and a German in this respect is not that the public prosecutor's position is stronger, but that the judge's position is somewhat less aloof. Actually the judge is no more than a *primus inter pares.* The positions of the three parties to the trial are almost equal. . . .

DR. W. BRUECKMANN
German Consul
Atlanta, Georgia

Likes Mr. Gerhart's Article on Improving Legal Writing

■ Congratulations to Mr. Eugene C. Gerhart for his article entitled "Improving Our Legal Writing" published in the December issue of the JOURNAL.

I would enjoy reading further essays by him or by some of his fellow Scribes telling the lawyers how to write well and briefly. The JOURNAL may not be averse to the publication of such essays, on the strength of their instructive worth to lawyers.

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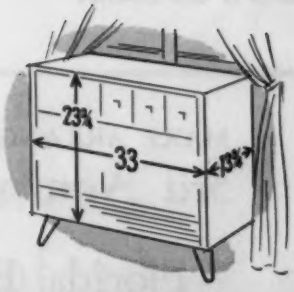

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judges and others engaged in the production of legal writings.

In the above connection, I believe a section in the JOURNAL entitled, say, "How Would You Say It?" or a similar heading, would be welcomed by the readers and beneficial to them. The author or director of this section could write sentences such as the following: "If we are to be forceful we must avoid pedantic slavery to grammatical rules," and then rewrite the sentences, if possible, in less "fancy words," devoid of "evidence of pompous pride of knowledge". (The quotations are from Mr. Gerhart's article.)

Incidentally, is not the phrase "in conclusion" in essays and related writings now appraised by successful writers as worthless and superflous? (Sorry, I am unable to cite the sources of information on this.)

FELIX H. GARCIA
San Antonio, Texas

Socialism and Social Security

■ I picked this jewel out of a letter to you from Mr. Harry G. Liese of New York in the December JOURNAL.

> I see no socialism in the type of social security system which has been in effect about twenty years. I do see a threat in what happened in Russia and in Germany if we yield to the ministrations of people who do not want to be taxed for the benefit of all of the people.

Unless some one disputes me, I want the record to show that our Social Security system was borrowed from Germany, the product of Bismarck's program of nationalization, socialization and universal military training which produced a nation of un-moral sheep that "yielded to his ministrations", and followed, first, the Kaiser and, next, Hitler along the path of war, at the end of which was total cataclysm. The Soviet democracy and that of China, likewise, care for the animal man from the cradle to the grave, give work to those who want it and make those work who do not want to, often, as slaves.

I have been struck by the way in which we have been following in many respects Italian, German, or Russian social, economic and political ideas under the strange fancy that we are going the other way. Thus far, we have simply called them by different names.

HENRY W. COIL
Riverside, California

Liked Our August Issue

■ Among the "bread and butter" reading I took home last weekend was the August issue of your JOURNAL. I expected to thumb through it in half an hour or so, but instead spent much of Saturday and part of Sunday reading practically

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everything in it. I cannot forgo writing to tell you of the remarkable improvement in the JOURNAL. . . . Both format and content are excellent. The articles are scholarly without being pedantic and of untold help to those in active practice. I found myself unable to skip a single article, and though I wanted to put my teeth into Bertrand Russell's fascinating volume, *The History of Western Philosophy* recently given me, I could make little progress on that compelling and masterful work. . . .

FERRE C. WATKINS

Chicago, Illinois

The Public Interest and the Preparation of Tax Returns

■ What best serves the public interest should be the only issue in the current dispute between lawyers and certified public accountants as to their respective roles in federal tax practice. Instead the controversy to date has largely been couched in terms of defining "unauthorized practice of law", a really irrelevant question.

The American Bar Association apparently recognizes the right of certified public accountants to practice before the Treasury and the Tax Court except to the extent that the particular services involved constitute "the practice of law". The Bar further maintains that it is for state courts to define this term.

Accountants, on the other hand, believe themselves entitled to determine and settle any and all questions of federal tax liability which may be presented to them. For this privilege, which they appear to have been exercising almost unquestioned during the past forty years, they now seek explicit confirmation. They assert that "tax practice" does not involve "practicing law".

Hence, the quarrel is in defining what particular determinations and settlements of federal tax problems constitute "the practice of law" which should be reserved solely to lawyers. If the two professions continue approaching this question as one of definition they have a long and difficult road ahead.

A better approach would be to decide whether engaging in certain tax activities by accountants is inherently in the public interest. If it is, the right of accountants to do these things should be conceded and the concept of "unauthorized practice of law" revised accordingly. If it is not, the accountants should forthwith be restrained.

Whether it is in the public interest for a certain group to resolve the tax problems presented to it appears to depend both upon the ethics and upon the technical competence of the particular group. It probably can not be demonstrated that lawyers as a group are more honorable and ethical than accountants as a group. If this is so, the issue must turn solely upon competence. The question may therefore be restated thus: Who is more competent to handle the average tax problem; the average lawyer or the average certified public accountant?

In Pennsylvania, at least, a candidate for admission to the Bar is not required to demonstrate any knowledge whatever of federal tax principles or procedures. Applicants for the C.P.A. degree, on the other hand, are specifically tested for their knowledge of these subjects. The solution of tax problems largely involves working with figures and making analyses of books, accounts, and financial statements, all the usual work of accountants. Do these facts support the proposition that tax practice is primarily a province for lawyers?

It is true that state laws of partnerships, trusts, gifts, etc., are interwoven with federal tax law, but experience shows that a knowledge, however thorough, of these principles alone may be a hindrance rather than a help in federal tax practice. The reports are full of taxpayers who relied to their sorrow upon common law concepts of partnerships, trusts or gifts as a guide in determining their federal tax liabilities. In fact, it is yet to be demonstrated that on the whole a taxpayer is better served in tax problems by a lawyer not acquainted with tax matters than by a certified public accountant unversed in general law.

In addition to a predetermined concept of "unauthorized practice", the current controversy presupposes another basic premise of the bar association, the validity of which should also be explored. This is the necessarily implied assumption that the average client is not competent to make his own decision as to his tax adviser and hence should be restrained from a free choice. Concededly, such a restraint is not necessarily improper or undemocratic. Most would agree that the uninformed and uneducated should be deprived of the opportunity of jeopardizing their health or the security of their beneficiaries. It is this group who might otherwise rely on a department store for their glasses and dentistry or on an insurance

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agent or justice of the peace to prepare their wills. But can these precedents of the past be applied to the tax controversy of today?

State courts have held, and probably most lawyers would agree, that C.P.A.'s may rightfully prepare simple tax returns and resolve uncomplicated tax questions. This scope of action appears broad enough to fill the needs of the vast majority of taxpayers, certainly those in the lower brackets. Hence it is not a question of protecting the uninstructed or unsophisticated from non-members of the Bar. It is rather corporations, trusts, and wealthier individuals who are to be restrained from their apparent desire to use C.P.A.'s to determine and settle their tax liabilities. Why should these presumably educated and informed upper-bracket taxpayers, who have the intricate returns and the complicated problems, be prevented from retaining the tax practitioners of their choice?

A more realistic project for the Bar would be to develop more competent tax specialists in its own ranks and then permit them to hold themselves out to the public as such. Tax work is just as much a specialty as patents, copyrights or admiralty. If this were generally recognized by the Bar, a taxpayer could choose among lawyers with assurance that the selected practitioner would recognize a major tax problem when it appeared. That this, unfortunately, is too often not now the case, has been amply demonstrated by the general decision of the business community to use C.P.A.'s in the tax field.

When the Bar begins providing the American public with a better brand of tax service than is now offered by accountants, legislative or court action to compel people with tax problems to turn to lawyers will not be necessary. In the long run the public can be trusted to determine its own best interest!

JEROME C. BACHRACH
Pittsburgh, Pennsylvania

From a Member of the Cast of "Fieri Faces"

■ Some of us gave up a part of our summer vacation to help entertain the American Bar Association. It is gratifying to see that it was appreciated. The article and the pictures in the November JOURNAL make us happy.

I know I express the sentiments of the members of the cast when I thank you for this fulsome recognition.

GEORGE L. QUILICI
The Municipal Court of Chicago

Defends Sober Second Thought

■ Sincere congratulations on your brilliant editorial of last July entitled, "Sober Second Thought," wherein you justifiably criticize Senator McCarthy. The fact that the United States Senate has just censured him, this being only the third time in American history that a Senator was ever censured, confirms your superlative judgment. I am certain that the overwhelming majority of American lawyers agree with you but, unfortunately, they have not as yet come to your defense, so here goes:

A forthright Franciscan, Father Leon Sullivan, was recently quoted in *Commonweal*, one of America's outstanding Catholic magazines, as follows (Senator McCarthy is a Roman Catholic): "My missionary career in China ended in a Communist court in which accusations were taken as facts, charges as proof, and in which the police announced that, 'Defense is not necessary; we never make a mistake; when we arrest you, you're guilty.'" With this experience behind him, the former missionary said frankly that, "I would rather return to my Chinese prison cell than avail myself of Senator McCarthy's protection."

"I am the truth", the commissar

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The Trowbridge Case:

A Near Miscarriage of Justice

by **Charles S. Desmond** · ***Judge of the Court of Appeals of the State of New York***

■ **The case of the People v. Trowbridge was a commonplace, obscure criminal trial like thousands of others in the everyday grist of the courts. The newspapers reported that an armed robber held up a drug store; the store manager identified the suspect, an ex-convict on parole. The suspect was convicted and sentenced to thirty years to life as a fourth-felony offender. The Court of Appeals reversed on what the newspapers called a "technicality". Judge Desmond uses this case to show the value of the "technicalities" of the rules of evidence with which laymen and lawyers alike sometimes grow impatient.**

■ The so-called "technicalities" of our law of evidence have had a poor press for many a year, and few of us are so bold as to do them reverence. A writer usually strikes a popular chord when he decries the restrictive nature of evidentiary rules and argues for their abolition in favor of a "saner" or "more realistic" or "more modern" system of "putting all the facts before the jury". Any lawyer (and many a layman) can cite you instances, actual or apocryphal, where rigid application of hoary old rules have kept from the eager ears of jurors—and to no apparent good purpose—facts the jurors should have known. But once in a while the other side of the coin turns up. The crudities and excesses of the recent Army-McCarthy-Schine hearings made conventional courtroom procedures appear most orderly and right.[1] And once in a while it is possible to demonstrate the real practicality, utility and justice of evidentiary "technicalities".

A case in point, I suggest, is that of Albert Trowbridge, found guilty, on June 30, 1951, by a New York State jury, of robbery in the first degree and sentenced to from thirty years to life in prison, as a fourth felony offender.[2] Trowbridge would still be serving that sentence had not an appellate court, in October, 1953, reversed the judgment because of what must have seemed to many a technicality most arbitrary. Here, it might have been said—and probably was said—was a prime example of the benighted practice of setting aside a jury verdict for a violation of a mechanistic and outdated rule, in the face of compelling proof of guilt. Trowbridge, so it then seemed, was to be tried all over again, just to do deference to that old devil "technicality". But Trowbridge never was tried again. The indictment against him was dismissed because, as it turned out, the robbery never took place at all.

The rule of evidence applied by the New York Court of Appeals in Trowbridge's case was the old one,[3] now or formerly in vogue in some states, which says (with some exceptions not pertinent to the discussion) that identification testimony given at the trial cannot be bolstered by a showing that the witness had, previously and out of court, made a similar identification of the defendant. In New York, in 1927, as one of the "Baumes Commission" changes, the rule of the case law[4] was statutorily modified[5] so that now, "When identification of any person is in issue, a witness who has on a previous occasion identified such person may testify to such previous identification". So in New York, self-bolstering by a witness is to that extent permissible. But the 393-b exception is a limited one and, on a showing that its limit had been overrun at his trial, Trowbridge was awarded a reversal and a new trial.

The Trowbridge Story . . . *A Case of Armed Robbery*

Not in any effort to outdo the "whodunits" but to show how all this worked out to get justice for Trowbridge, we will, from newspaper ac-

1. See, for typical comments on this, TIME, May 3, 1954, and LIFE, May 17, 1954.
2. N. Y. Penal Law, §194.
3. See, 70 A.L.R. 910 *et seq.*; 4 WIGMORE ON EVIDENCE (3d edition) §1130, note 2; 22 C.J.S. §725.
4. *People* v. *Jung Hing*, 212 N.Y. 393; *People* v. *Seppi*, 221 N.Y. 62; *People* v. *Purtell*, 243 N.Y. 273, 280.
5. N.Y. Code of Criminal Procedure, §393-b; see *People* v. *Spinello*, 303 N.Y. 193, 202.

counts and court records, sketch the Trowbridge story. "Armed criminal takes $327 at gunpoint in drugstore", headlined the *Troy Times-Record* of March 2, 1951. According to the newspaper, one Margolius, manager of a drugstore, was alone in the place in the early evening of March 1; he had been held up and tied up by a bandit who took $27 from two cash registers, leaving Margolius lying on the floor. The bandit fled. When two women customers entered, Margolius, "whose bonds were not strongly fastened" had freed himself and was notifying his employer and the police. "The bandit was described as being about 6 feet tall, weighed about 140 to 150 lbs. had dark hair and wore a camel's hair coat which was somewhat dirty. He did not have a hat." [The discrepancy as to how much was taken was a point made in Trowbridge's appeal.]

Two weeks later[6] the same newspaper informed its readers that "a man arrested by Albany police this morning has been identified as the armed bandit who staged a daring holdup at Daffner's Pharmacy on Thursday, March 1". The man under arrest was Albert Trowbridge, and the positive identification had been furnished by the store manager, Margolius. Trowbridge never admitted the crime, but he had a criminal record including a 1940 robbery conviction under the name of "Raymond Morley" on which he had served ten years in Sing Sing prison.[7] After a preliminary hearing before a Troy police justice, Trowbridge was ordered held for grand jury action. On April 11, 1951, he was indicted for robbery, first degree, and on June 27, 1951, went to trial for that crime before a jury in the County Court of Rensselaer County. He was represented by two attorneys.

The issues tried to the jury were simple ones, and in the end the jurors' minds were troubled, it seems, by one question only—was the defendant, Trowbridge, the robber? The jury, after hours of deliberation, gave the affirmative answer and thus rejected the alibi sworn to by Trowbridge's witnesses. Margolius testified[8] in great detail to the alleged robbery. He was alone, working at his prescription counter, he swore, when the defendant came in and ordered cigarettes. As Margolius walked toward the cigarette counter and toward Trowbridge, the latter displayed a revolver and announced that a "stick-up" was under way. Margolius, doing as he was told, went into a back room where Trowbridge tied up Margolius with the victim's own tie and belt and with a towel. From the clerk's pockets, he said, there was taken a wallet with $230 in bills, much of which represented receipts of the store and so belonged to the store's proprietor. Then Margolius heard the cash register opened and heard his assailant leave the building. After the stick-up announcement, said Margolius, the robber put a handkerchief to his own face but meanwhile Margolius had an opportunity to look him over. When the police came, Margolius described the thief as being between thirty and forty years old, of about one hundred forty pounds weight and about six feet tall. He wore a dirty camel's-hair type overcoat. He wore no hat, but Margolius did not notice whether or not he had a receding hair-line. (When the store manager's attention was called, at the trial, to the appearance of defendant, the witness had to admit that Trowbridge was noticeably bald.) As soon as the robber left, and before anyone else entered the store, Margolius, so he testified, was able to work free from his bonds and then telephoned the police. About a week later, walking along a Troy street one morning, Margolius saw the robber a little distance away and wearing a grayish-green topcoat and a gray hat, but the robber jumped on a bus and got away. Margolius reported that encounter to the police. On March 16, eight days after that incident and fifteen days after the crime, Margolius testified, he went to the police headquarters at Albany, New York, across the Hudson River from Troy, and there identified the defendant as the man who had robbed him and whom he had later seen walking on a Troy street.

There was further prosecution testimony that, shortly after the alleged robbery, Margolius was in a nervous state and disheveled in appearance. One of the defendant's acquaintances had seen him, several weeks before the drugstore incident, wearing a dirty camel's-hair coat. That same witness told of a conversation with Trowbridge two weeks after the drugstore robbery in the course of which talk Trowbridge had told the witness that he (Trowbridge) had changed buses in Troy on the morning of March 8 at about the time and place Margolius said he had seen Trowbridge.

The testimony, duly objected to by trial counsel and on which the reversal on appeal was later based, was given for the People by a Troy police detective named Conley. Conley was allowed to say that he had gone, with another detective and Margolius, to Albany police headquarters and that Margolius had there pointed out, as the robber, Trowbridge, who was in confinement there under the name "Morley". Defendant's counsel objected that the prosecution was "seeking to bolster an identification by proving by one witness that Mr. Margolius made an identification which is nothing more than what Mr. Margolius told us". The trial judge overruled the objection. Another detective present at Albany police headquarters on that occasion was ill and did not come to the trial.

Then came the defense. Defendant Trowbridge did not himself take the stand, but called nine witnesses. Principally, their testimony was offered to prove an alibi for Trowbridge—that he was not in Troy at the time of the claimed hold-up. At that time or a few minutes later, some of them swore, he was at his Albany rooming house, some miles from the Troy drugstore. Trowbridge at that time wore, so these witnesses said, a gray coat and hat.

6. Times-Record, Troy, New York, March 16, 1951.
7. Perhaps that explains his failure to testify on his own behalf at the trial.
8. Testimony summarized from transcript on file in Rensselaer County Clerk's office.

Two of these witnesses said that Trowbridge formerly had a camel's-hair coat but that it was old and worn and he had disposed of it (testimony the tendency of which was to hurt rather than help the defendant, it would seem). All the defense witnesses made it a point to say that the balding Trowbridge, sensitive about his hairlessness, usually wore a hat, indoors or out. He had worked, they said, on March 1 and March 8 and on both occasions wore a maroon-colored jacket and a hat. Unfortunately for Trowbridge, more than one of those witnesses located Trowbridge, on March 9, in Troy (where Margolius said he saw him on the street that day).

There was no confession or statement by defendant, no fingerprints at the drugstore were testified to, and neither the robbery weapon nor Trowbridge's camel's-hair coat were ever found.

Trowbridge took an appeal from his conviction to the appropriate intermediate appellate tribunal, the Appellate Division of the Supreme Court, Third Department.[9] He no longer had the services of a lawyer, but filed his own brief and submitted it to the court without oral argument. The Appellate Division's affirmance was unanimous. Its memorandum opinion[10] said, in substance, that there had been a fair question of fact for the jury and no errors in the judge's instructions to the jury, and that "the victim's prior identification of defendant at the Albany jail was permissible. (Code Crim. Pro. sec. 393-b)". The court made no specific answer to defendant's argument that it was error to allow someone other than the victim to testify to a prior identification by the victim.

A Technicality . . . *The Court Reverses*

Twice bloodied but still unbowed, Trowbridge, acting *pro se*, applied (by mail) to the writer of this article, pursuant to New York practice[11] in non-capital criminal cases, for a certificate that there was in the case a question of law which should be reviewed by the court of last resort. His showing was sufficient for that purpose and he was granted the certificate which authorized an appeal to the Court of Appeals. On his application the court assigned a youthful but able and aggressive counsel to represent him (without fee). The Court of Appeals, on July 14, 1953, reversed the judgment of conviction and ordered a new trial.[12] Judge Conway's opinion, for the majority of the court, summarizing the proofs, emphasized the fact that the verdict was "entirely dependent upon the complainant's testimony that there was a robbery and his identification of defendant as the perpetrator of it". Section 393-b, the opinion pointed out, changed the old, or "Jung Hing" rule[13], but only to the extent of allowing the identifier, not any other person, to put before the jury the fact of the previous identification. Section 393-b, the court said, was plain in language and meaning and, deviating from the common law, was to be applied strictly.

Judge Conway's opinion, unintentionally prophetic, warned of the danger of allowing numerous witnesses to testify to a previous identification by one of them, thus giving an appearance of strength to an inherently weak case. The court listed those weaknesses. "The whole case against defendant is in the tongue of complainant." He alone told of a robbery. There were discrepancies as to the amount stolen. Margolius had described his assailant as holding the gun in his right hand, whereas Trowbridge was left-handed. Margolius had not told the police that the robber was bald, Trowbridge was noticeably so. There was impressive alibi testimony. In the face of all this, held the Court of Appeals, the violation of the exclusory rule could not be overlooked. "We would be reluctant to say in a case like this that any error which is apt improperly to enhance the weight of such testimony should be disregarded." A brief dissenting opinion took the view that the error involved in taking Detective Conley's testimony could not have influenced the jury or prejudiced the defendant.[14]

Charles S. Desmond was born in Buffalo and educated in the local schools, receiving his LL.B. from the University of Buffalo in 1920. He was elected to the New York Court of Appeals in 1940 and was re-elected in 1954 for a twelve-year term. He is the author of numerous articles for law reviews and has lectured in the law schools of various universities, including Yale, Notre Dame, Wyoming, Virginia and Buffalo.

Now, back to the newspaper accounts. Trowbridge was held in custody during the summer of 1953 awaiting trial at the autumn term. But October told a different tale. The press announced on October 23, 1953[15] that complaining witness Margolius had been indicted on a charge of grand larceny, first degree, the accusation being that he had appropriated more than $500 of his employer's money, from about June 1, 1940, to about July 1, 1952. Then into court came the Rensselaer County prosecutor praying that the indictment against Trowbridge be dismissed, and dismissed it was, on the ground that, with Margolius as sole witness, another trial of Trowbridge

9. N.Y. Code of Criminal Procedure, §520. subd. 2.
10. *People* v. *Trowbridge*, 280 App. Div. 1015.
11. N.Y. Code of Criminal Procedure, §520, subd. 3.
12. 305 N.Y. 471.
13. *People* v. *Jung Hing*, 212 N.Y. 353.
14. See N.Y. Code of Criminal Procedure, §542.
15. Times-Record, Troy, New York, October 23, 1953.

"would be a useless gesture and an unnecessary expense to the county". Trowbridge, however, did not go free but was turned over to parole officers who held him under a warrant charging that he had violated parole on his previous conviction, and "owed time" thereon. As of the time this article is being written, Trowbridge is serving, in New York's Clinton Prison, the balance of an earlier (1940) sentence as to which he was on parole at the time of the "drugstore robbery". Found by the New York Parole Board to have violated some term of his parole, he has several more years to serve in prison, unless the Parole Board should reparole him.[16]

On October 28, 1954, Margolius, the store manager and complaining witness against Trowbridge, pleaded guilty to a reduced charge of petit larceny and is now making restitution.[17]

A friend with whom I discussed this case said that he saw in it a demonstration of the weakness of the jury system rather than proof of the practical wisdom of the laws of evidence. Perhaps it points both morals. A trial judge trained in analyzing testimony and sitting without a jury might more readily have seen the flaws in the prosecutor's case against Trowbridge. He might, from his experience and his reading, have been more alert to the danger involved in accepting Margolius' sole identification, as against the very reasonable doubt set up by the alibi and by the other countervailing items in the record. But it is the entrusting of the fact-finding function to jurors, honest and zealous but sometimes lacking the judge's special training, which necessitates the strict application of evidentiary rules.

It is easy enough to answer that the jurors in their own affairs, like all mankind, rely on hearsay, pure opinion, even on guesses, intuition and hunches. That's the way the world runs, and why should the fusty old courts treat jurors like children who cannot be allowed to listen to the facts of life, or like incompetents whose thinking must be done for them by the judges? But because a citizen orders his own affairs on curbstone advice or casually passes along gossip as fact, it does not follow that, as a juror, he can apply such methods to solemn arbitraments as to his neighbor's property or liberty. A juror, as soon as sworn, becomes a part of the judicial institution and function. His prepossessions and prejudices he must park outside, with his car. Inside the courtroom, he is no longer licensed to make snap judgments, or to apply his workaday superstitions. He must come to his judgments by thinking, and there is no time to teach him how to think, how to reach right conclusions from appropriate premises, how to discard and ignore, or how to shut his ears to the irrelevant, the distracting and confusing. The centuries-old judicial institution, in which he takes temporary office, substitutes, for the course in logic for which there is no time available, time-tested methods of keeping from his ears that which cannot, in logic and justice, be useful to the decisional process.

If a juror has a trained and efficient mind, he is not the loser by this exclusion. The laws of evidence do for him what he would inevitably do for himself if he had to. On the other hand, if a juror's training and his customs have not habituated him to right methods of arriving at conclusions, he has no cause for complaint when the law, out of its ancient wisdom, sees to it that he is furnished right materials only.

Trowbridge's case, commonplace and obscure as it was, lacking the dramatic denouement, of, say, Bertram Campbell's,[18] may seem an imperfect example for our use here. Just another "little" criminal trial like thousands of others in the everyday grind of America's criminal courts, its telling lacks the dramatic punch of the celebrated miscarriages made forever famous in Professor Borchard's book, *Convicting the Innocent*. But it is just the insignificance and routine character of Trowbridge's trial that should make us think hard about it and the questions it raises. The answers? Two, I think: first, that real caution is always needed in the appraisal of identification testimony; and, second, that the most "technical" of our rules of evidence deserve ungrudging support and enforcement.

16. This information supplied by New York State Department of Correction.
17. Troy Times-Record of October 29, 1954.
18. See *Campbell* v. *State of New York*, 188 Misc. 586.

A Noble Profession:

A Panorama of Law Office Practice

by **Eugene C. Gerhart** • *of the New York Bar* (*Binghamton*)

▪ **The problem of organizing an office for the practice of law is something that many young law school graduates must face every year. While not all newly admitted members of the Bar go into practice for themselves, most lawyers sooner or later will have to consider the problems of managing a law office which Mr. Gerhart discusses in this article.**

▪ Thousands of eager, bright-eyed young law school graduates are launched each year on careers at the Bar. These young men and women are crammed with the latest appellate court decisions on a variety of legal doctrines. They are usually quite capable of turning out an excellent brief. But they are faced with the stark reality of earning a living, of getting a job, of producing income. Their enthusiasm may suffer a mortal blow when they learn that managing partners of large law firms believe that these individuals "would not be 'worth a damn' for several years as responsible representatives of the firm in trial work. . . ."[1] Yet a lawyer's worth, both intellectual and economic, increases with the number of years of his practice. This is a beacon of hope to the neophyte in the law. So, in that hope, let us examine, in panoramic fashion, the aspects of law office practice. Perhaps such a bird's-eye view of the law will enable the fledgling lawyer to orient himself more quickly to his personal satisfaction.

The opportunities for utilizing his law school education are many and varied for the modern law school graduate. Private legal practice—while generally absorbing the largest number of graduates—is only one of these. The law departments of large corporations, insurance companies, banks and industries, each year absorb their quota of law school graduates.[2] Government legal service attracts many young lawyers. Such practice would include government agencies like the Federal Trade Commission, the Securities and Exchange Commission, the various government law enforcement agencies, the Bureau of Internal Revenue, as well as cabinet level departments such as the Department of State. Government criminal law service includes not only the state and federal district attorneys' offices, but also the Federal Bureau of Investigation. The Judge Advocate Generals' Corps offer opportunities for young advocates with a military predilection.

Besides private practice and government service, there are allied occupations which employ legally trained men. High on this list are the legal scholars, professors and law teachers. Politics is a fertile field for ambitious young lawyers as any study of history will prove. Many leading business executives in American industry started their careers as lawyers. Labor union lawyers today hold positions of high respect and high income as well.[3] Nevertheless, our discussion here will be limited to the young lawyer in private practice.[4]

The law school graduate has several choices among different types of law office organizations. If he decides to set up for himself—not always the wisest initial step—he will be practicing in the smallest possible legal unit of his profession. He will be practicing like a British barrister—on his own.

> It is an absolute rule of the [English] bar that every barrister must work as an individual and not in a firm. He must be responsible for his own opinion; and this is the conception of his duties that remains with him to the last.[5]

1. Mason, Book Review of Vanderbilt, *Modern Procedure*, 101 U. OF PA. L. REV. 573 (1953).
2. See Barker, *The Life Insurance Company Lawyer*, 4 HARV. L. SCH. BULL. 8 (No. 2, April, 1953); Maddock, *The Corporation Law Department*, 30 HARVARD BUSINESS REVIEW 119 (March-April, 1952).
3. See Segal, *Labor Union Lawyers: Professional Services of Lawyers to Organized Labor*, 5 INDUSTRIAL AND LABOR RELATIONS REVIEW 343 (No. 3, April, 1952).
4. For a fine discussion of the opportunities in the law, and the preparation for it, see Redden, CAREER PLANNING IN THE LAW, and its companion volume by that author, So You WANT TO BE A LAWYER (Indianapolis: The Bobbs-Merrill Company, Inc., 1951). See also Vanderbilt, STUDYING LAW (New York: Washington Square Publishing Corporation, 1945).
5. Whitney, *Inside the English Courts*, 3 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (No. 9, December, 1948) 365 at 372.

Great advocates see a special social value in that type of practice.[6] There are both advantages and disadvantages in being a solo practitioner.[7] Yet there is a breadth of view in solo practice that it is almost impossible to gain in the specialized practice characteristic of a large firm. The late Mr. Justice Jackson, an upstate New York "country lawyer" from Jamestown, put it well:

> This tendency to demoralize the general practitioners and to create a bar of specialists has an effect upon the judiciary. No person who rightly appreciates the advantages of the division of labor will deny an important place in an advisory and consultive way to the specialist, but his seat is not the seat of judgment. That seat calls for a breadth of view and understanding which may not be so deep as the specialist's, but must be broader.[8]

At the other extreme are the large law firms which have been irreverently dubbed "law foundries" or "law factories". These firms are concentrated in the large metropolitan areas. It is clear that such firms serve the legal needs of the large aggregations of capital in the business and financial world.[9] Such firms offer job opportunities in three main categories: (1) associate attorney; (2) junior partner; and (3) senior partner. The gap between the first category and the third is a wide one for the majority of young aspirants. But for those who succeed the reward is often a top place in professional and financial honors.

Robert Swaine in his two volume work, *The Cravath Firm*,[10] describes the "Cravath system" of selecting young law student recruits. The scholastic standard of the "Cravath system" makes a Phi Beta Kappa man from a good college who had become a law review editor at Harvard, Columbia or Yale the first choice. Such standards are commonplace today among New York offices.[11]

In between these two extremes there are two chief choices for the young law school graduate. His first choice—probably his wisest—is to seek work with a small or medium-sized law firm—unless his scholastic attainments justify "Cravath system" ambitions. In the small firm of two to five law partners, the young man will have close contact with both the client and an experienced practicing lawyer. His second choice may be to open his own office and share library and office space with associates who also practice independently.[12] This latter type of practice is common among lawyers in the country and in small cities. It combines the advantages of independent practice with some of the economies of partnership. In the last analysis the choice is up to the individual—and there is no disputing tastes. Regardless of the type of office, there are many problems which are common to both large offices and small ones.[13] These we can briefly review with profit. The first big problem of any law office is overhead.

Law Office Overhead . . . *A Combination of Factors*

The amount of expense which a lawyer incurs by way of overhead will depend on several factors. Among these are his location, his capital, his independent income, if any, and his personal tastes and standards, as well as the number of his prospective employees, type of equipment purchased, and so forth. In a survey made in 1951 by the American Bar Association, questionnaires were sent to lawyers in every state of the Union. The replies to these questionnaires indicated that law office overhead ranged between a low of 10 per cent and a high of 72 per cent. The mean average overhead reported for 122 law offices, large and small, from all over the country, was 31 per cent. It would appear therefore that office overhead can be counted upon to consume about one third of the gross income of a law office. This is not a fixed figure. It will fluctuate from year to year. But it is a norm to be kept in mind in appraising the annual financial statement of the office each year.[14]

One authority has this to say on the point:

> In most law offices the big cases that earn big fees are carrying the burden of the overhead, and the lawyer is really losing money on the average run of work done in the office. A simple cost system based on real overhead costs will obviate this costly condition and furnish an adequate basis for increasing the earning capacity of the lawyer.[15]

In determining overhead costs it is fashionable to allocate six hours per day to legal work as productive time. It is fallacious to assume every working day a lawyer is in practice that he can charge some client for each of those six hours. This point is often overlooked by young lawyers particularly. It is this reason—there are others equally cogent—which admonishes the keeping of accurate time records.[16]

Fees are the life blood of every law office.[17] The day is past when lawyers can practice law without regard to the economic and financial side of their profession. Most American law school graduates are not heirs to large fortunes and therefore must earn their living from their professional services. Lawyers' salaries and fees are therefore of vital concern to young lawyers today.

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6. See Stryker, THE ART OF ADVOCACY (New York: Simon and Schuster, 1954), Chap. VII; Vanderbilt, *The Five Functions of the Lawyer*, 40 A.B.A.J. 31 (Jan., 1954).

7. See Stephens, *Finding Your Place in the Legal Profession*, in Vanderbilt, STUDYING LAW, 685 at 694; Redden, CAREER PLANNING IN THE LAW, II; Gerhart, *Going It Alone*, 32 A.B.A.J. 397 (July, 1946).

8. Address by Robert H. Jackson delivered before the Beaver County Bar Association, Beaver Falls, Pennsylvania, on March 30, 1935.

9. See Swain, *Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar*, 35 A.B.A.J. 89 (February, 1949).

10. Privately printed at Ad Press, Ltd., New York, (1948).

11. Volume II, page 3.

12. See Gerhart, *Organization for the Practice of Law: How Lawyers Conduct Their Practice*, 37 A.B.A.J. 729 (October, 1951).

13. An especially good pamphlet of the American Law Institute has been prepared on this whole subject. See Price, PERSONAL AND BUSINESS CONDUCT IN THE PRACTICE OF LAW (Law Office Management), (September, 1952), available at the Director's office of the American Law Institute, Philadelphia.

14. See Smith, LAW OFFICE ORGANIZATION; McCarty, LAW OFFICE MANAGEMENT, c. XXX; Gerhart, *Organization for the Practice of Law: How Lawyers Conduct Their Practice*, 37 A.B.A.J. 729 (October, 1951).

15. McCarty, *op. cit.*, at page 443.

16. See *e.g.*, Carrington, *How Some Lawyers Have Increased Their Law Office Income*, 26 N. Y. ST. BAR BULL. 30 (February, 1954). A simple check list for the young lawyer setting up his own office will be found in an article by the author entitled *Going It Alone*, 32 A.B.A.J. 397 (July, 1946). Firm practitioners will find firm accounting problems discussed in Smith, LAW OFFICE ORGANIZATION, available from the American Bar Association Journal, 1155 East Sixtieth Street, Chicago 37, Illinois. Price 50 cents.

17. Wherry, *An Essay on Lawyer's Fees*, 25 N. Y. ST. BAR BULL. 372 (December, 1953); Trobaugh, *What Every Lawyer Should Know About Fixing Lawyer's Fees*, 41 ILL. BAR JOURNAL 688 (No. 12, August, 1953).

The young man who takes a position with a large firm will have little to do with fixing the fees to be charged. That will be the prerogative of the partners. For the young lawyer on his own or sharing space with associates, however, the problem must be squarely faced. In either case the criteria are generally the same. Legal services fall into three main categories: (1) retainer work; (2) a case by case method where each piece of work is separately charged for; and (3) charity or legal aid work for which no fee is charged at all. The first two only need occupy our attention here.

A retainer agreement is a contract between a lawyer and his client covering the lawyer's services, usually for a given period or until modified. A retainer may cover all legal work done for the client. More often, however, it will except certain types of legal work, such as the conduct of a trial, for which a separate charge will be made. Retainers may be payable monthly, quarterly, annually, or on any other mutually agreeable basis. Practical and sound advice on retainers can be found in Harold P. Seligson's pamphlet, *Building a Practice*, published by the Practising Law Institute. Experience proves that the cheapest, most efficient way for a businessman to get legal advice is to retain a lawyer on a retainer agreement. Some economy-minded businessmen often question this principle, but experience with a fair-minded lawyer generally convinces them otherwise. From the lawyer's standpoint the advantage of a monthly or quarterly income to meet his recurring expenses is obvious. The amount of the retainer should be subject to review by the client or the lawyer upon request.

What are the elements which a lawyer should consider in putting a price on his professional services? What elements should he consider in determining his fees? A lawyer soon learns that there is no "standard" price which fits every case. Most county bar associations have a fee bill which indicates the usual *minimum* charge made by lawyers in that county for certain types of law work. There are certain collection rates established by commercial collection associations.[18] Some legal fees are fixed by statute, but not many. Fees are often fixed by courts. These cases do not require the lawyer to determine his own fee and are therefore no problem.

The American Bar Association in its Canons of Professional Ethics has attempted to set forth the principal considerations the lawyer should take into account in making his charge. Those elements are:

(1) The time, labor and skill involved;

(2) Possible loss of other employment;

(3) Customary charges of the Bar for similar services;

(4) The amount involved and the benefits resulting to the client;

(5) Whether the compensation is certain or contingent;

(6) Whether the attorney's services are for a casual or a constant client.

None of these considerations is controlling. They are mere guides. Canon 12 observes also that "it is proper for a lawyer to consider a schedule of minimum fees adopted by a bar association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee".

From the client's standpoint, the crucial issue in the case is the result. Clients are not interested in paying the tuition fee for a lawyer's post-admission legal education. The client expects his lawyer's opinion of the law to be confirmed by the judge's decision. A poor result means the lawyer's services have not been beneficial to the client. A good result means the reverse. Therefore, the result is a crucial element in fixing the lawyer's fee.

It is sound advice not to let the client fix the fee. The client will be annoyed if the lawyer requests him to do so. The client realizes he does not really know what a fair fee is. He does not know the time the lawyer has spent on his case. He probably does not know the customary charges of the Bar. The lawyer may suggest that the client fix the fee in the hope—usually vain!—that the client will offer him more than the lawyer would have dared to charge. He may! A few stories like that circulate among lawyers—but their very novelty indicates the improbability of their being repeated. Much more likely, either because the client does not know better, or because he is willing to take advantage of counsel,[19] is what happened to Daniel Webster. His story points a moral to the young lawyer.

Eugene C. Gerhart has practiced in Binghamton since his return from service in the Navy in World War II. A graduate of Princeton University and the Harvard Law School, he is a member of the New Jersey and New York Bars. He has been a member of the Board of Editors of the Journal since 1947.

Webster, it seems, had opened up his law office in Portsmouth, New Hampshire, shortly after graduating from Dartmouth. One day the local blacksmith consulted the struggling young lawyer about conflicting claims he and a neighbor had to a parcel of land. The question was a tough one and Webster cannily told his blacksmith client that he was very busy and would give him an

18. *E.g.*, the rates established by the Commercial Law League.
19. Tracy, The Successful Practice of Law, page 61.

opinion in a few days. Webster's meager library offered no solution, no precedent, no case in point. So Webster took the stagecoach to Boston where, after a day in the law libraries, he developed a theory of the case that later won him the verdict for the blacksmith.

"How much do I owe you, Mr. Webster?" asked the blacksmith as they left the courthouse.

"Oh," answered the lawyer in cavalier fashion, "pay me whatever you think you can afford."

"Well," said the blacksmith, "you seemed to run it off pretty easily, so I guess $1.00 should about cover it."

Dan's expenses had run about $50.00—so his lesson in fixing fees had been a costly one!

It is true that the best legal service to the client is based upon mutual understanding. It is the lawyer's obligation to educate his client as to the fairness of the lawyer's charges. The most important factors to be considered in fixing that charge are first, the results accomplished, and second, the difficulty and importance of the legal questions involved. The lawyer should receive fair compensation for the work he has done. The client should also be satisfied that he has been fairly charged. The lawyer is never justified in padding his bill. In fact, an extortionate charge for legal work is ground for suspension from practice.[20]

Contingent Fees . . . *The Ethical Standards*

In America clients and lawyers are familiar with the contingent fee. England regards the contingent fee as unethical. The Canons of Professional Ethics of the American Bar Association[21] accept the contingent fee so long as it meets with ethical standards. It has been accepted in commercial practice. For example, most insurance companies forward subrogation cases to attorneys with a statement that the lawyer's fee shall be 25 per cent if settled without suit, and 33⅓ per cent if suit is instituted. It has been suggested that contingent fees ranging between 20 per cent and 33⅓ per cent are ethically acceptable.[22] On the other hand, unusual circumstances can be imagined which would justify a contingent fee of 50 per cent. Such a fee, however, would only be justified where the hopes of recovery for the plaintiff were very small, that is, where the risk to the lawyer was very great. Statutes or rules frequently require the disclosure of the attorney's interest in a case, as for example the rules governing practice before the Treasury Department.[23]

When an out-of-state attorney forwards a case to a local lawyer for trial, it is usual for the out-of-state attorney and the local lawyer to share the total fee paid by the client in an agreed percentage. Such forwarding fee arrangements are professionally ethical, if fair.[24] The rule-of-thumb division is one third to the forwarding attorney and two thirds of the fee to the local lawyer. The Canons make it clear that, "No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."[25] Division of legal fees with laymen is obviously improper and the Canons of Ethics prohibit it.[26]

A workable rule has been established by lawyers in practice. It is sanctioned by professional ethics. "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."[27]

Law office costs, as practicing lawyers are well aware, have been steadily mounting for the past fifteen years.[28] Young lawyers therefore will be well advised to keep their advances on behalf of clients to a minimum. A workable solution to the problem of initial expenses on behalf of the client is this. Request from the client an initial advance or deposit on account of expenses. This is not part of the lawyer's retainer. It is the client's money and should be deposited in the attorney's trustee account. Against this credit the attorney can charge the required initial expenses of starting suit such as service fees, filing fees and similar small expenses. A strict account of such disbursements must always be kept and rendered to the client as part of the lawyer's final accounting for his legal services.

A lawyer has an attorney's lien on his client's papers as security for the attorney's fee. If it is necessary to exercise the attorney's lien, it is clear that lawyer and client do not agree on the value of the lawyer's services. If disputes arise between attorney and client, the local bar association's committee on professional fees provides one method of settling the dispute. Suing a client for a fee is always a last-resort method. It is sometimes necessary, but should only be resorted to when the lawyer would otherwise be defrauded of his fee.[29] The part of wisdom is for the lawyer to avoid as long as possible, consistent with his professional self-respect, getting into a situation where the lawyer is in a hostile relationship with his client.

All of us like to receive big checks! They inflate our egos. They boost our professional pride. The trouble is that taxes, inflation and other expenses have made clients loath to write big checks! So, sending out big bills for lawyer's services raises the question of whether that is a wise course. Perhaps the "Four R's" rule is a better technique.

The "Four R's" rule, which one old lawyer followed, works like this. First, he got his "retainer". Then, when that was used up, he got a "reviver". When he was deep into the case and really needed some financial encouragement, he got what he called a "resuscitator". Finally, when the case was all over, he billed his client for the "remainder". This old lawyer's "Four R's" rule makes sense

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20. *In re Levenson*, 197 App. Div. 46, 188 N.Y.S. 730, reargument denied, 199 App. Div. 966, 191 N.Y.S. 935.
21. See Canons Nos. 13 and 42.
22. Tracy, THE SUCCESSFUL PRACTICE OF LAW, page 58.
23. See Treasury Department Circular No. 230, P-H Fed. Tax Ser., 1954. [Par. 21,254 (y)].
24. Canons 34 and 38.
25. Canon 34.
26. Canon 34.
27. Canon 42.
28. See *e.g.*, Balthis, *Law Office Costs Go Up: A Few Suggestions as to What To Do About It*, 33 A.B.A.J. 974 (October 1947).
29. Canon 14.

The Two Bulwarks of Liberty:

A Free Press and an Independent Judiciary

by Elisha Hanson · *of the District of Columbia Bar*

▪ In recent months, the Journal has published several articles on the subject of the difficulty of reconciling the need for freedom of the press to cover criminal trials and the danger such freedom presents to justice when newspapers give sensational publicity to the proceedings. Mr. Hanson's viewpoint is somewhat different from that of our former articles. He cites many cases where publicity by newspapers was virtually the only means of securing justice. The article is taken from an address delivered before the 1954 Summer Institute on Communications at the University of Michigan Law School in Ann Arbor.

▪ In Guatemala, by a decree of government issued on June 8, all individual liberties and rights of the people of Guatemala were suspended, to remain suspended at the pleasure of those now holding power in that country. The right of assembly has been ended. If more than two people stop to talk on a street corner all are subject to arrest, to be held incommunicado in jail without the right to petition for a writ of habeas corpus to regain their freedom.

What has happened in Guatemala is no different from what happened in Germany under Hitler, what has happened and continues in Russia and behind the Iron Curtain and what has happened in Argentina under Peron.

In the light of such events affecting the lives of millions of people, this subject is one of tremendous importance.

It relates to the very heart of our system of government embracing a series of checks and balances through the separation of powers. It relates to the right of the people to know what each of our three branches of government is doing. It relates not only to the right of the people to know, but also to their right to convey information and to express opinion. It relates to the right of a fair trial.

In any consideration of the exercise of the contempt power by judges, the fundamental question under the historic American concept of liberty is what is the appropriate remedy for the abuse charged?

And, if judges choose to refrain from invoking an appropriate remedy available to all others, may they invoke one of their own choosing through the claim of inherent power inherited from the English common law to punish as contempt publications not to their liking?

In *Bridges* v. *California*,[1] reaffirmed in *Pennekamp* v. *Florida*,[2] the Supreme Court has answered this question in the negative. Even so, because of incidents attending certain notorious trials within the more recent past those who would seek to censor the press in the performance of its function of reporting judicial proceedings have seized upon the epithet "trial by newspaper" as the shibboleth in their campaign.

There can be no such thing as "trial by newspaper" if the judges presiding at trials, lawyers representing the parties to the proceedings and public officials charged with the prevention of crime take proper and presently available steps to prevent the very thing about which there has been so much recent talk. Motion for change of venue, among others, is always an appropriate move to obtain and secure a fair trial.

The *Delaney*[3] case in Boston, the recent *D'Alesandro*[4] and the *Pollock*[5] cases in Maryland illustrate this fact.

So before discussing the background and the history of the exercise of the contempt power in the United States, it is well to examine the facts in some of these recent cases which have caused a hue and cry in certain areas for a return to the discredited system of judicial control of court news.

First, it is essential to examine the the functions of the press.

1. 314 U.S. 252 (1941).
2. 328 U.S. 331 (1946).
3. *Delaney* v. *U.S.*, 199 F. 2d 107 (1st Cir. 1952).
4. *Maryland* v. *D'Alesandro* (unreported).
5. *Maryland* v. *Pollock* (unreported).

The functions of a daily newspaper embrace the gathering and dissemination of information in the form of news, editorial comment and advertising.

News is factual information concerning matters of public importance that in the judgment of the editor is of sufficient general interest to warrant its publication.

Editorial comment is discussion of such matters from the analytical or critical viewpoint.

Advertising is information concerning the goods, services or ideas of one who is willing to pay to have that information disseminated through the press.

The right to have a free press is the right of the people, not a privilege of a particular segment of our economy engaged in the business of gathering and disseminating information in the printed form. Publishers are but trustees of this right.

Thus the press not only has the obligation to gather and disseminate information of general public interest, but it has the greater obligation —that of preserving the right of the people to have a press free from restraint in the performance of its functions and from whatever source restraint may spring.

In *Delaney* v. *United States*, the First Circuit reversed the conviction of the federal collector of income taxes at Boston on various charges of corruption. The reversal was granted chiefly on the technical ground that the trial judge erred in not granting Delaney's motion for an indefinite continuance based upon the contention that unfavorable publicity he had received made a fair trial at that time and in that court impossible.

Even though the newspapers had nothing whatsoever to do with initiating the publicity, even though radio and television stations gave it relatively as much attention, the court took occasion in its opinion to castigate what it chose to term "trial by newspaper" and observe that the Supreme Court possibly had not spoken the last word on that subject as yet.

Now what were the facts in the *Delaney* case?

Wholesale corruption was uncovered in the Bureau of Internal Revenue. As a result of prodding by congressional committees and by one United States Senator in particular, the Department of Justice finally moved in. In due course, congressional inquiries and court proceedings were going on simultaneously. Shortly after Delaney was indicted, the King Committee of the House of Representatives, over the protests of Delaney's lawyer and that of the Assistant to the Attorney General in charge of his prosecution, held hearings on Delaney's conduct of his office.

One of the questions posed by this situation was whether the newspapers and the radio and television stations should report or ignore the King Committee hearings.

Who would contend that corruption in government is not a proper subject for news reporting? Or that newspapers, press associations, radio and television stations should not report the facts of corruption as brought out in open congressional committee hearings?

The committee hearings were in October. Delaney was brought to trial in January. In motions filed before trial, his counsel sought only delay, not a change of venue. The trial judge thought that sufficient time had elapsed since the hearing to insure a fair trial. But the record shows that before denying the motion for indefinite continuance, he first suggested to Delaney's counsel that if made, he would grant a motion for change of venue. The suggestion was rejected.

In retrospect, there is ample ground in this record to surmise that what Delaney sought was not a fair trial, but no trial at all.

Now let's go from Boston to Baltimore. A group of boys, including a son of the Mayor of Baltimore, were indicted on charges growing out of molesting two young girls—one not of teen age—who were picked up on a street late at night and taken to an apartment where they were kept for some days.

Under Rule 904 of the Criminal Court of Baltimore, which was struck down by the now historic decision in the *Baltimore Radio Show*[6] contempt case, the Baltimore papers would have been silenced as to these alleged offenses. However, no longer being silenced, they reported the facts of the arrests and the trials.

The mayor's son was the only defendant found not guilty. Over objection of the State's Attorney, he was tried prior to some of the other defendants. When these were called by the state as witnesses against him they refused, upon the advice of their counsel, to testify for fear of incriminating themselves.

At the conclusion of the series of trials, in the later ones of which defendants in testifying in their own defense stated that the mayor's son was present at the time the girls were picked up and did participate in the orgy, the presiding judge referred his case to the State's Attorney with the suggestion that the matter be laid before the grand jury for an inquiry as to whether perjury had been committed.

In the course of the inquiry, allegations were made that a Baltimore politician had tampered with the proceedings that had resulted in the one acquittal.

Indictments were returned against the mayor's son for perjury and against the politician for tampering.

Again, the Baltimore newspapers, no longer silenced by Rule 904, reported those facts.

The two cases were promptly called for trial. Each defendant, through counsel, moved for a change of venue. The motions were granted. One case was sent to Western Maryland, the other to the Eastern Shore. Both, notwithstanding day by day reporting in the newspapers, resulted in acquittal, one in fact by direction of the trial court.

The newspapers in these cases reported the facts. The courts con-

6. *Maryland* v. *Baltimore Radio Show, Inc.* 67 A. 2d 497 (1949); *cert. den.* 338 U.S. 912 (1950).

ducted the trials fairly, openly and speedily. Whatever one's opinion may be as to the verdicts—and in America every man possesses the right to his own opinion—the contention has not been advanced that these cases were "trials by newspaper", even though the fear of trial by newspaper was advanced as grounds for the motion for change of venue in each case. No better illustration of an appropriate method to prevent the alleged abuse of "trial by newspaper" can be presented.

Even in *Shepherd* v. *Florida*,[7] had they stood alone, the incidents referred to by two of the Justices of the Supreme Court as preventing a fair trial could have been handled by the judge to make a fair trial possible. However, from the inception of that case a fair trial was impossible for the compelling reason that the defendant was charged in an indictment which the Supreme Court found to be fatally defective in that it violated the equal protection clause. It was on this ground of discrimination that the judgment was reversed.

The recent *Jelke*[8] case in New York is pertinent to this discussion solely because it has been seized upon as another illustration of so-called "trial by newspaper". The defendant, an irresponsible inheritor of wealth, was indicted for compulsory prostitution. When he was brought to trial, the trial judge failed to regard the fundamentals of a fair trial in many respects. He communicated with and interrogated jurors after they have been selected and the trial was in progress. He even had a private conversation with one juror after his selection. Instead of ruling on a juror's qualification to serve he vacillated and finally allowed the juror himself to make his own determination. As the Appellate Division said,

> The trial judge completely abdicated to the juror the court's authority to make a determination of the qualification of the juror to sit.

Then when an application was made, not by the District Attorney, not by the defendant's counsel, but by an attorney representing one of the state's witnesses, to close the trial to the public during her testimony, the judge announced he would grant the application, *inter alia*, because of the youth of this witness and also in the interest of good morals and common decency. The witness, though young, was a notorious prostitute. After making that ruling the judge adjourned court until the following Monday when he expanded his ruling and barred the public and the press from the courtroom for the duration of the people's case.

Thus the judge conducted a private trial during the presentation of the people's case and a public trial only during the presentation of the defendant's.

On this point, the Appellate Division, in its opinion, said:

> We conceive it to be no part of the work of the judiciary . . . to decide what a newspaper prints or to what portion of the people it caters to sell its papers. A judge may have his personal opinion as to the good taste of what may appear in the public print, but when serving as a judicial officer he has no right, in a situation such as this, to restrain or dictate what portion of court proceedings shall be made available for reading by the public.

The courts of New York obviously do not see eye to eye on this question of a public trial. In an opinion in a case arising under different circumstances some months prior to the *Jelke* case, another judge stated his view thus:

> When a newspaper publishes matter which it had no legitimate access to and which the public policy of the state declares should not be made available—the publication is not privileged but made at peril.[9]

In that case the judge gave greater emphasis to a court rule than to the expressed public policy of the state as set out in Section 337 of the Civil Practice Act, which reads:

> A civil action cannot be maintained against any person . . . for the publication of a fair and true report of any judicial, legislative or other public and official proceedings.

In these two quoted opinions is to be found a concise presentation of the issue presented in the controversy between those who oppose control by judges of information about judicial proceedings and those who favor it.

Elisha Hanson is counsel for the American Newspaper Publishers Association. In that capacity he participated in several of the leading cases discussed in the article. He is a member of the District of Columbia and Maryland Bars.

After the close of our Revolution the great fear of the people was not over the arbitrary abuse of power by the states, but over the possibility of its abuse by the Federal Government. During the debates over the ratification of the Constitution it soon became apparent that that instrument would not be ratified unless there were incorporated in it a series of prohibitions against the invasions of individual liberty by government such as those with which the people of the young republic had been familiar while suffering under the foreign yoke. These prohibitions were written into the Bill of Rights. By reason of the prohibition against abridgment of free speech and of a

7. 341 U.S. 50 (1951). Also see *Brown* v. *Mississippi*, 297 U.S. 278 (1936), wherein the brutality of police officers and the failure of the trial judge to conduct a fair trial resulted in a reversal, after exposure of their disregard of due process by a newspaper aroused public opinion against such a miscarriage of justice in the state court.

8. *New York* v. *Jelke*, 284 App. Div. 211, weekly advance sheets of August 7, 1954, and affirmed by Court of Appeals on December 31, though not yet reported.

9. *Danziger* v. *Hearst Corporation*, 304 N.Y. 244; 107 N.E. 2d 62 (1952).

free press in the First Amendment and the attitude of the various states our forefathers mistakenly thought they had put an end to all restraints of the press, including censorship through the exercise of the contempt power.

How wrong they were!

In the period of its adolescence the young republic and some of its states turned again to the exercise of many of the hated powers previously exercised against their citizens by the mother country, including contempt.

Under the Sedition Act,[10] seditious libel was made punishable by contempt. Numerous convictions were had under that law, but when the administration which sponsored it was overthrown, the new President, Thomas Jefferson, was so outraged by the act and its application that he immediately pardoned all persons theretofore convicted and ordered discontinuance of all prosecutions.

A few years later in Pennsylvania, as a result of the imprisonment of an editor for contempt, the Pennsylvania legislature sought to remedy the situation in that Commonwealth. In 1809[11] it enacted a law limiting summary contempt to:

1. Official misconduct of court officers,
2. Disobedience of process, and
3. Misbehavior in the actual presence of the court which actually obstructed the administration of justice.

As an additional precaution summary punishment for publication was expressly forbidden.

In 1829,[12] the New York legislature adopted a substantially similar act in which, however, it did provide for punishment, as contempt, of publication of false, or grossly inaccurate reports of judicial proceedings, but with the proviso that "no court can punish as a contempt the publication of true, full and fair reports of any trial, argument, or proceedings had in such court".

Finally in 1831,[13] Congress enacted a federal contempt law—four words in which subsequently gave rise to much of the controversy over the power of judges to punish publications as contempt, and which was not settled until *Bridges* v. *California* in 1941.

The act of 1831 limited the authority of federal judges to cite for contempt to the following situations:

1. Misbehavior of a person in the presence of the court or so near thereto as to obstruct the administration of justice.
2. Misbehavior of an officer of the court in official transactions.
3. Disobedience by any person to any lawful writ, process, or order of the court.

As pointed out by Lois G. Forer in her brilliant Ross Prize Essay, in 1953,[14] the words "or so near thereto" were not given their intended meaning until the Supreme Court in deciding the *Nye*[15] case explicitly reversed the *Toledo Newspaper*[16] case. *Bridges* v. *California* followed almost immediately. By its decision in that case the Court rejected the view that judges could punish as contempt any publications which they regarded as reflecting upon them or tending to obstruct the administration of justice. Clear and present danger of an immediacy and high imminence displaced reasonable tendency as the rule.

Nye v. *United States* was decided on statutory grounds; *Bridges* v. *California* on constitutional considerations. In the *Bridges* case the Court laid down a rule applicable to all courts, state and federal alike, including the Supreme Court. Yet the contention was raised that the *Bridges* case left open the question as to whether a state through legislative enactment could vest the courts with power to punish publications by contempt actions. There was no state statute on the matter in California.

In *Pennekamp* v. *Florida*, this question was resolved.

The states were held to have no such power.

In a discussion such as this, space limitations preclude consideration of many of the cases. A few will serve our purpose so I shall start with *Patterson* v. *Colorado*.[17]

In a bitterly contested election in Colorado, the Democrats, who were seeking office, prevailed. The Republicans, who were in office, sought to hold on. Patterson published articles and a cartoon in which he challenged the motives of the Supreme Court of that state in aiding the Republican contestants. He was immediately cited for contempt. He moved to quash the citations on the ground not only of local law and state constitutional provisions, but on the further ground that the action was precluded because the Fourteenth Amendment extended the prohibition against abridgment of a free press to the state courts of Colorado. His motion was overruled, whereupon he answered the citation and asserted that the articles were published in pursuance of what he regarded as a public duty, averred the truth of the articles and set up and claimed the right to prove the truth and his freedom to publish them under the Constitution of the United States. The Colorado court found against him and upon review, the Supreme Court, speaking through Mr. Justice Holmes, of all persons, upheld the state court.

In his opinion, Mr. Justice Holmes said:

> If a state should see fit to provide in its constitution that conduct otherwise amounting to a contempt should be punishable as such if occurring at any time while the court affected retained authority to modify its judgment, the Fourteenth Amendment would not forbid.

Mr. Justice Harlan filed a vigorous dissent in which he asserted that the privileges of free speech and of a free press, belonging to every citizen of the United States, constituted essential parts of every man's liberty and were protected against violation

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10. Act of July 14, 1798, c. 74, 1 Stat. 596.
11. 1808-1809 Pa. Acts., c. 78, p. 146.
12. N.Y. Rev. Stat. of 1829, Tit. 2, Art. 1, §10.
13. Act of March 2, 1831, c. 99 4 Stat. 487.
14. Forer, *A Free Press and a Fair Trial*, 39 A.B.A.J., 800 (September 1953).
15. *Nye* v. *United States*, 313 U.S. 33, 1941.
16. *Toledo Newspaper Company* v. *United States*, 247 U.S. 402 (1918).
17. 205 U.S. 454 (1907).

Industrial Commissions:

The Law, the Facts and the Record

by **Mortimer Levitan** • *of the Wisconsin Bar (Madison)*

Mr. Levitan's article is based upon his years of experience as an Assistant Attorney General of the State of Wisconsin during which he has represented the state in hundreds of compensation cases before the industrial commission and the courts. His views of what a hearing before an industrial commission should be, how it should be conducted and what criteria should be used to evaluate the results of the hearing have a broader application than workman's compensation cases. Mr. Levitan's discussion is really an analysis of the basic concept of what constitutes a fair hearing.

Industrial commissions are administrative bodies of multitudinous facets. They have been entrusted with manifold duties and burdened with variegated functions. One of their most important functions is the determination whether injured employees or their dependents are entitled to benefits under workmen's compensation acts. Usually when an industrial commission awards or denies compensation or death benefits, its action is subject to judicial review. This discussion concerns the making of records which will present the administrative, quasi-judicial actions fully, fairly and favorably to the reviewing courts.

Since industrial commissioners, arbitrators, referees, deputies and examiners are usually normal human beings, it is only natural for them to drift into the conviction that they know infinitely more about the compensation laws than anyone else—and especially judges. This conviction may breed antipathy toward criticism and resentment against judicial review. It should be recognized, however, that nobody—not even industrial commissions, or, for that matter, any administrative agency or lower court or even court of last resort—can always be right. It may be suggested, too, that very few human beings can resist the temptation to act capriciously in the absence of all supervisory authority. Unfortunately, responsibility to one's conscience is not always an effective substitute for responsibility to the legislature, the electorate or the courts. No human being can be trusted with omnipotence. When, therefore, legislatures entrust the courts with the power to review commission orders, the situation should be accepted with grace and gratitude. One highly commendable method of manifesting the proper cooperative spirit is to create a record of commission proceedings that will make it easy and pleasant for the courts to determine whether the commission was right or wrong.

My views on the subject of this discussion are a by-product of many years devoted to representing the State of Wisconsin in compensation cases before the industrial commission and representing the industrial commission in cases before the circuit and supreme courts. You see, in Wisconsin the compensation act requires the attorney general to represent the state in cases before the industrial commission and also to represent the industrial commission in court in all actions brought to review commission orders and awards. Throughout my thirty-two years as assistant attorney general, the industrial commission work has been one of my chief assignments. The result is that I have been on all sides of most questions—indeed, occasionally I even appear against myself. For instance, when a state employee is fatally injured and leaves no total dependents, I appear for the state and attempt to establish that there is no liability under the compensation act so that no benefits will be payable from the state treasury, and in the same proceeding I also appear for the state to establish that there is liability under the compensation act so that the children's fund may receive $4000 from the state treasury. Sometimes when I lose a case before the commission, it becomes my duty to defend the commission in the circuit court for deciding against me.

And sometimes when the commission, through inadvertence or otherwise, decides a case incorrectly against the State of Wisconsin, I may commence an action on behalf of the state against the commission, in which case special counsel is appointed to represent the commission. Thus while it is customarily my pleasant legal duty to argue in court that the commission is always right, sometimes I have the refreshing privilege of arguing that it is all wrong. My comments, however, are not based solely on personal experience; they are based also on the reading of many cases from other jurisdictions, as well as on imagination and conjecture—conjecture as to what might happen to any commission if carelessness and thoughtlessness should ever stage successful infiltrations. This statement is made primarily to avert the possibility of misconstruing anything said in this discussion as adverse criticism of the Wisconsin commission.

The commission's record of proceedings which is presented to the courts for review should disclose more than a close adherence to the procedural requirements of the compensation act; it should disclose an assiduous endeavor to ascertain the truth, a proper application of the controlling legal principles and a logical determination based upon the facts and the law. The record should also disclose on its face that the hearing had been fairly, considerately and impartially conducted; that opportunity had been freely accorded for the presentation of all essential facts; and that conscientious consideration had been given to all factual and legal problems involved in the controversy. Above all else, it should be manifest on the face of the record that the commission did not act capriciously. Industrial commissions, like everybody else, have the capacity for making mistakes. A stupid mistake honestly made casts no reflection upon a commission; an intentional mistake, no matter how lofty the motivation, is thoroughly reprehensible and tends to bring all administrative bodies into disrepute. The record which goes to the courts should have the texture of thoroughness, the bloom of benevolence and the atmosphere of fairness. The commission's record should be beneficently judicial rather than belligerently partisan.

An Essential to Fairness . . . *Confidence of the Litigants*

There is more to the commission's record than appears on the typewritten page. There are the intangibles which though invisible are glaringly present. Things said or done before the controversy reaches the hearing stage may not actually appear on the face of the record but they illuminate or shadow the record nevertheless. For instance, the instilling of confidence in the fairness of a prospective hearing is just as essential as a fair hearing in fact. No matter how impartially a hearing may be conducted, there is no fair hearing unless the litigants are initially confident that they will receive a fair hearing and ultimately satisfied that they have received a fair hearing. It is essential that claimants be informed of their rights, benefits and privileges under the compensation act. That information should be given, not in the jargon of compensation experts, but in the language used and understood by injured workmen. And it is important that claimants be impressed with the fact that they are entitled to hearings at which their claims will be carefully and sympathetically considered, not as a benignity but as a matter of absolute right.

When a controversy is brought on for hearing the atmosphere of fairness can be created before a single word of testimony has been taken —an atmosphere that will persist throughout the hearing and permeate the entire record. The attitude or demeanor of a commissioner or examiner may create the impression that the cards are stacked. An injured employee with no familiarity with procedure before the industrial commission cannot be expected to feel at ease or calmly evaluate every phase of the proceedings. The meaningless banter between an insurance company lawyer and an examiner may appear significantly sinister to the claimant. To the claimant every whisper in the hearing room bears directly on his claim for compensation, and he cannot be expected to appreciate that the friendly conversation between examiners and lawyers concerning the weather or the baseball game will not affect adversely the outcome of his case.

When the hearing begins the presiding examiner should endeavor to impress all litigants, their attorneys and their witnesses with the dignity and seriousness of the quasi-judicial proceeding. There should, however, be no pomposity, no over-awing, no tension. Rather, there should be a calm, businesslike, semi-informal spirit, deliberately calculated to promote the ascertainment of the true facts as efficiently as possible. The presiding examiner should swiftly demonstrate that the proceeding will be conducted not only with absolute fairness, but also with sympathy and understanding. He should be friendly, helpful and solicitous. He should be firm but not stern, well-informed but not smug, tolerant but not obsequious. He should not be discourteous to any attorney, any claimant, any witness, nor should he permit any attorney to browbeat or insult any witness—not even if the witness richly deserves such treatment. Injured workmen are human beings first and foremost, and all human beings are entitled to be treated with humanity and dignity. All parties should be accorded equal courtesy and consideration. The young, inexperienced, floundering attorney who appears for a compensation claimant is entitled to just as much consideration as the adroit, proficient practitioner appearing for an insurance carrier. Throughout the hearing the impression must constantly be preserved that the outcome of the controversy depends not on friendship, not on political or financial prestige, but solely on the facts and the law. The guiding principle should always be that the com-

mission has no authority to award compensation as a matter of favor or deny compensation as a matter of meanness.

The record of proceedings that goes to the court should present no hastily prepared, sketchy picture of the facts. True, the development of the entire picture may require infinite patience on the part of the presiding examiner, but an examiner who hasn't the patience to listen to all of the pertinent testimony at a hearing has neither the temperament nor the right to be an examiner. The strict application of rules of evidence may shorten a hearing but destroy the essential nature of a commission hearing—that is, an attempt to ascertain all of the facts simply, directly and sympathetically. The exclusion of all but clearly competent, relevant testimony frequently results in the miscarriage of justice, because irrelevant testimony has an annoying habit of becoming extremely relevant. It is impossible for presiding examiners always to determine correctly on the spur of the moment either the relevancy or the importance of every bit of testimony offered. All errors in the reception of testimony should be in favor of reception rather than rejection. Of course there comes a time when thoroughness ceases to be a virtue and becomes the dullest of vices—the vice of prolixity. There are few stories that stand endless repetition and those stories aren't told in hearing rooms—at least they shouldn't be.

No matter how many lawyers are present to assist—or occasionally impede—the hearing, it is still the function of the presiding examiner to see that the controlling questions are asked and answered. In presenting a case to the courts there is a feeling of complete frustration when a record is searched for the one question and the one answer which mean the difference between liability and no liability, only to find that everybody forgot to ask the $64 question. For instance, a medical witness may testify so brilliantly in regard to his wonderful qualifications, his ingenious diagnosis, his ultra-modern treatment and the resulting favorable prognosis, that everybody forgets to ask his opinion as to whether the disease resulted from the employment. Moreover, examiners should possess the magic gift of divining and eliciting evidence which the parties, because of inordinate self-interest, may seek to forget or suppress. Unfortunately the parties, as well as their attorneys, sometimes become unmindful of the idealistic spirit of a compensation hearing—a quest for truth unhampered by obstructive tactics, personal enmities and obsessions to prevail regardless of merit.

The Nature of Honesty . . . *Absolute Truth Is Impossible*

Every witness, including expert witnesses, should have the desire as well as the opportunity to testify with reasonable honesty. Absolute honesty is an achievement impossible of realization—a fortunate thing for society in general. Just imagine the woe that could be caused by one garrulous, uninhibited, completely honest man let loose in any peaceful community! Reasonable honesty, of course, consists of something more than half-truths; it consists of striving for candor within the limitations imposed by human variations in observation, perception, memory and interpretation. Incidentally, it sometimes seems that courts, commissions and lawyers while beckoning to truth with their right hands seek to halt it with their left hands. A good record discloses a conscientious attempt on the part of all parties to present honestly and fairly all the facts to the commission.

One of the customary ways of preventing an expert witness from telling the substantial truth is to browbeat him into giving a "yes" or "no" answer. Actually there are very few questions that can be answered honestly by *yes* or *no*. In the first place, few questions can be phrased with such care and precision that an expert witness can tell with absolute certainty what the question means. Questions must be phrased in words, and words mean different things to different people. A witness in answering a question in the affirmative may be answering a question entirely different from that which the attorney attempted to ask. But assuming that the questioner and the witness are reasonably well agreed as to the meaning of the question, the problem remains, can the expert answer truthfully by a nod or a shake of his head? The chances are that he will feel the necessity of explaining, limiting or qualifying his answer. An expert who deems it unnecessary to explain the basis of his opinion obviously believes that the mere expression of his opinion confers on it the mantle of infallibility.

Questions that involve problems of judgment rather than observation simply defy desolate affirmative and negative answers. A medical expert, for instance, can testify that a man's leg is broken, but unless he was present at the breaking, he really doesn't *know* whether it was broken at work or at home. A medical witness asked whether an employee contracted silicosis as a result of working in a certain factory cannot state with untempered positiveness that silicosis resulted from that particular employment. He can testify that in his opinion the workman has silicosis, that

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in his opinion there was sufficient exposure in the factory to produce silicosis, that he has not been informed of any other adequate exposure and that hence in his judgment the known exposure produced the silicotic condition. In other words, he can testify not as to actualities but merely as to his medical conclusions. The medical witness can truthfully testify in regard to his opinion concerning possibilities and probabilities; but when he is required to testify peremptorily concerning certainties, he is compelled to stretch or otherwise distort the truth. While positive statements from medical witnesses make it easy for courts to find evidence to sustain commission findings of fact, such positive statements should actually detract from the witness' credibility.

Not only should expert witnesses be relieved from the necessity of involuntary falsification, but they should also be freed from the obligation of deciding legal questions. Questions of law are frequently found lurking in questions that ostensibly relate only to medicine. Too often medical opinions expressed on the witness stand show the influence of erroneous assumptions as to what the law is or should be. Physicians frequently cannot resist the impulse to decide the ultimate question of liability instead of limiting themselves to the medical problem involved. When one expert testifies that a causal connection between employment and disability is speculative, while another testifies that the probabilities indicate a causal connection, there may be no difference in the medical knowledge, medical judgment or ethical concepts between the two doctors. The variations in testimony may be explained by semantics rather than medicine. For instance, one doctor will testify that something is speculative because he considers everything speculative which cannot be proved. Another doctor will testify that it is not speculative because he considers that a logical medical inference based upon generally accepted medical principles is not speculation. A few explanatory remarks by the presiding examiner would materially assist medical witnesses in deciding questions of medicine rather than questions of law. The result would be salutary not only for the reputation of the expert witness, but also for the factual determinations by commissions.

When all of the testimony has been presented, it becomes the solemn duty of the commission to exercise that precious power usually reserved for juries—determining the facts. That involves passing on credibility, weighing evidence, drawing logical inferences. Ordinarily the commission's findings of fact are conclusive if supported by any evidence. Thus, while a commission's mistakes of law can be corrected by the courts, there is no remedy for a commission's mistakes of fact. That is why every commission should exercise its prerogatives in the factual field with scrupulous care, conscientiousness and impartiality. Commission records do not habitually disclose why one witness was believed and ten disbelieved. If commissions were required to indicate why they chose to believe the one witness as against the other ten, or why they relied on one mote of evidence and disregarded the overwhelming bulk, the chances are that even fewer commission findings would be set aside by the courts—and for the obvious reason that the requirement would lead to different findings.

A Difficult Problem . . . *The Credibility of Witnesses*

It is unquestionably true that the trier of the facts is in the best position to determine credibility. Mannerisms, voice, demeanor, appearances cannot be preserved by a stenographic transcript. Testimony which is obviously and flagrantly false when uttered in the hearing room may acquire the complexion of absolute truth when put on paper. On the other hand, some witnesses may be such proficient and persuasive liars on the witness stand that the falseness of their testimony emerges only in the typewritten transcript. Thus while in the field of credibility the courts should permit the commission to be the judge, in turn the commission should customarily permit the examiner who saw and heard the witnesses to be the judge of credibility.

Commissions have the power to decide cases against the overwhelming weight of testimony. This, of course, is a power for evil which good commissions never exercise. The respect of the public, the confidence of the courts, the trust of the interested parties—these are all essential to the success of any administrative agency. It is only by deciding in accordance with the fair weight of the testimony that industrial commissions can earn, deserve and preserve their preeminence among the prolific crops of boards, agencies, and commissions. By deciding cases on the basis of isolated, attenuated bits of testimony rather than on the weight of testimony, a commission convicts itself of caprice or stupidity—and caprice is by all odds the more reprehensible. By never deciding cases against the preponderance of the evidence, a commission creates confidence that all cases will be decided fairly and honestly in accordance with the evidence presented. The reputation of the commission should never be sacrificed by strong-arm attempts to produce an equitable result in one particular case without regard to the effect on adjudications in all future cases. The integrity of the commission should never be impoverished by decisions based on personal predilections rather than on the evidence in the record.

After the commission has decided the factual situation it has the duty of applying the law as enacted by the legislature. Compensation acts are not the personal property of industrial commissions. The acts belong to the people and the industrial commissions are merely entrusted with the administration of the acts. The compensation acts may be faulty, they may be inadequate, they

(Continued on page 279)

Benjamin Robbins Curtis:

A Model for a Successful Legal Career

by **Richard H. Leach** · *of Atlanta, Georgia*

■ **This is a sketch of the life of one of the nineteenth century leaders of the New England Bar whose skill as a lawyer was appreciated alike by Daniel Webster and Chief Justice Shaw. Mr. Leach attributes Curtis' success to painstaking preparation of every case and his ability to make a brief, logical presentation of the decisive points.**

> [The law] is indeed a noble science. . . . As for myself, I love it unaffectedly and I study it closely.
>
> Benjamin R. Curtis to George W. Phillips
> November 2, 1831

■ Those who seek a model for success at the Bar might well reflect upon the career of Benjamin Robbins Curtis, leader of the New England Bar for a dozen or more years before his death in 1874.[1] For Curtis relied neither upon appearance nor histrionics nor mere personality to convey his points to judge and jury. He put his faith instead in a method, a mode of procedure, which, followed religiously, produced the results he desired for his clients and won him the accolade, "the first *lawyer* of America, of the past or the present time".[2] Those who witnessed Curtis argue a case invariably heard a masterful and convincing argument, which omitted nothing germane to the subject and covered nothing not essential to the point. He drew his audience forcibly along with a chain of reasoning and logic toward an inescapable conclusion as he proceeded without deviation from the A to the Z of the facts of a case. Throughout his argument, he buttressed his remarks with a thorough knowledge of the law and presented everything so clearly that the most ignorant layman became a fascinated listener. Skillful presentation was Curtis' special province. Through it, he achieved distinction, and because of it, he became an eminent lawyer. The lessons to be learned from him are many.

The rudiments of Curtis' method he acquired under Joseph Story at Harvard Law School. Story extolled the virtues of plain expression and clear-cut argument and warned his students:

> Whene'er you speak, remember every cause
> Stands not on eloquence, but stands on laws;
> Pregnant in matter, in expression brief,
> Let every sentence stand with bold relief;
> On trifling points nor time nor talent waste,
> A sad offence to learning and to taste;
> Nor deal with pompous phrase, nor e'er suppose
> Poetic flights belong to reasoning prose.
> Loose declamation may deceive the crowd,
> And seem more striking as it grows more loud;
> But sober sense rejects it with disdain,
> As naught but empty noise, and weak as vain.
> The froth of words, the schoolboy's vain parade

1. Born at Watertown, Massachusetts, 1809; died, Newport, Rhode Island, 1874. Member of the United States Supreme Court, 1851-57; author of the celebrated opinion in *Cooley* v. *Board of Wardens* (12 Howard 299) and dissenter in the Dred Scott case. Chief defender of Andrew Johnson at his impeachment trial.
2. The remark of Mr. Justice Samuel Miller, *Address of Mr. Justice Miller*, 24 ALBANY LAW JOURNAL 27 (July 12, 1879).
3. Joseph Story, *Advice to a Young Lawyer*, 1 THE WORKS OF CHARLES SUMNER (Boston, 1874) 145.

Of books and cases (all his stock in trade),
The pert conceits, the cunning tricks and play
Of low attorneys, strung in long array,
The unseemly jest, the petulant reply.
That chatters on, and cares not how or why,
Studious, avoid; unworthy themes to scan,
They sink the speaker and disgrace the man;
Like the false lights by flying shadows cast,
Scarce seen when present, and forgot when past.[3]

Perhaps no one in the Law School took Story's advice more to heart than Curtis. Those poetically expressed principles remained his guideposts the rest of his career.

But practice taught Curtis that more than facility and dexterity in the art of pleading was necessary to win cases. A firm knowledge of the applicable principles of law he found to be just as vital, and a part of his method came to be careful study, both to keep abreast of legal developments and to discover the real intellectual depths of the law itself. In his first years of practice, between 1831 and 1834, in Northfield, Massachusetts, where he was often "obliged to rely upon [his] own investigations —often upon [his] own inventions— to help [him] through difficulties . . . "[4] he quickly saw the advantages of disciplined research and thorough preparation. It was there, as Mr. Justice Miller noted many years later, that Curtis learned to turn out work which contained "no hasty preparations for trial leading to surprises and discomfiture . . . no defective pleading discovered too late for profitable amendment . . . no slovenly briefs patched up at the last moment, nor unwise citations of authorities dangerous to his case, because carelessly read or not read at all".[5]

In Northfield, he developed the lifelong habit of putting his trust in severe mental training, in painstaking preparation of each case, and in brief and systematic presentation of the decisive points. That early he realized the wisdom of taking whatever time was necessary to think through his case from beginning to end before he appeared in court, for then, when he did appear, he could deliver his argument sure that "no gaps were left . . . through which his opponent could enter the wall of his defenses. . . ."[6] It was at the beginning of his career, thus, that Curtis found the tools for legal superiority. He discovered that the lawyer was much like the cabinet-maker, in that careful planning and attention to detail and infinite patience, brought the highest rewards for both. Possessing that knowledge, he could go on to become a master craftsman of the law, rather than an apprentice carpenter.

A Master Craftsman . . . *Curtis Was a Legal Paragon*

Curtis' skill became fully developed after he removed to Boston to begin practice in 1834. There he perfected his craft, and before long, his reputation as a legal paragon was well established. That it was considered fortunate to be able to hear him in those days is attested to by frequent notations in the writings of such men as Daniel Webster and William Appleton that they had heard him. And that his arguments were appreciated alike from the Bench is equally obvious from many opinions in which either Justice Story, or his successor, Justice Levi Woodbury, of the United States Circuit Court, or Chief Justice Lemuel Shaw, of the Supreme Judicial Court of Massachusetts, commented upon them.[7]

What impressed all his hearers was his ability to analyze the correct principles of law in a case, to argue on those principles only, and to cover them so fully and so well that no client could ever feel that the case was lost because of its presentation. "His clearness of thought and precision of statement were the delight not only of bench and bar, but even of the educated laity who would be drawn into the court-room for the mere pleasure of listening to him as he unfolded an argument," Charles Francis Adams remembered. "Then the most intricate problems of law through his treatment of them became lucid . . . as he moved forward to the end his logic had in view, [he] seemed to forget or overlook no proposition, however small, necessary to the completeness of his reasoning, and yet to no proposition did he apparently give an unnecessary word."[8] As he addressed the court, he remained "clear, calm, distinct and unimpassioned", and to many, as to Adams, he seemed to have achieved perfection in both form and manner.[9] His contemporary, George S. Boutwell, recalled that Curtis was always equipped with whatever legal learning was required in the case before him and that he had both "the capacity to see the points on which a case must turn, and . . . the courage to pass over the immaterial facts, and points on which other men often lay stress to the injury of their arguments, and to the annoyance of the courts".[10]

A cultivated ability to argue and a habit of careful preparation were not the only facets of Curtis' polished legal methodology, however. Abraham Payne, the Rhode Island lawyer and friend of Curtis, was as much impressed by Curtis' refusal to be verbose and with the trust he put in the intelligence of judge and jury. He recalled once having heard Curtis argue a maritime insurance case. The defense was that the place where the vessel was lost was dangerous and that the captain had not exercised the best judgment in setting sail when he did. Curtis had risen to reply for the plaintiff and addressed the jury in the following words: "Gentlemen, the only defense to this case is that the navigation was dangerous and the captain made a mis-

4. Benjamin R. Curtis to George Ticknor, September 22, 1833, Benjamin R. Curtis, Jr., ed, 1 A MEMOIR OF BENJAMIN ROBBINS CURTIS LL.D. (Boston, 1879), 63.
5. *Address of Mr. Justice Miller*, *op. cit.*
6. *Ibid.*
7. See for instance the remarks of Story, J., in *Hale* v. *Washington Insurance Company*, 5 Law Rep. 202 (1842), and in *Elias Howe* v. *Ebenezer Abbott*, 2 Story 193 (1842).
8. Henry M. Rogers, who practiced at the Bar at the same time Curtis did, once remarked that Curtis could present a flawless argument in twenty minutes' time, a habit making not at all an insignificant contribution to Curtis' legal success. (Letter, G. F. Robinson to author, February 27, 1949).
9. Charles Francis Adams, RICHARD HENRY DANA (Boston, 1891), volume 2, page 138.
10. George S. Boutwell, REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS (New York, 1902), volume 1, page 111.

take. If navigation was not sometimes dangerous and if captains did not sometimes make mistakes, there would be no need of insurance companies." With only a few words more, he had taken his seat and the jury had forthwith brought a verdict in favor of his client.[11]

His Approach to a Case . . . *Intellectual, Not Emotional*

Another part of Curtis' approach was never to rely on any display of or appeal to emotion. He kept his own temper in check as he proceeded and never became ruffled, whatever the provocation. His appeal was intellectual, not personal. At a trial at a distant court, the defendant was being questioned about a previous trial in Massachusetts, and he was asked if B. R. Curtis had not then been his counsel. Upon receiving an affirmative answer, the question was put, whether at some time during that trial, his counsel had not flared up. So well did the defendant know Curtis' invariable rule that his reply was a smile. "What do you mean by *that?*" he was asked. "I was amused", he replied, "at the idea of Mr. Curtis *flaring up*."[12] His brother, George Ticknor Curtis, recalled that "To the passions or prejudices of men he never appealed."[13] Instead, Curtis kept his arguments plain and simple, unadorned by sentiment and addressed solely to reason. The joy in listening to Curtis came from hearing the unfolding of a series of propositions offered for their own worth, unembellished by anything to distract attention from their severely clean outlines.

Curtis did not always neglect humor, however much he disdained excess verbiage. Sometimes, he knew, wit added pungency to his sober logic. In the Morse Patent case, perhaps his most important early case, Rufus Choate, opposing counsel, had made an erroneous statement which Curtis believed Choate should have been alert enough to catch. "Well," he cracked, "'*This good Homer sometimes sleeps*'—and he certainly slept on this case!"[14] George T. Davis, a Harvard classmate, remembered once hearing Curtis say, when speaking of the fishways at Lawrence, that the legislature had directed them to be made to the satisfaction of the County Commissioners, but had failed to order them made to the satisfaction of the shad.[15]

A final essential of Curtis' method was a compound of his single-minded devotion to his practice, on the one hand, and his refusal to expand it too far, on the other. If throughout his career he subordinated all other interests and concerns to his pursuit of the law, he nevertheless kept constantly in mind what he had heard John Hooker Ashmun say of a Massachusetts barrister whom he had been asked to assess. "He has always had too much business to be a good lawyer."[16] Although he welcomed "the rough chances" of his practice, he was careful to "shake off the cares and thoughts of business often", seeking relaxation and diversion in literature, in friendly concourse, or in his family circle, in which he found "protection from that hardness and dryness of mind which a perpetual contact with the actual affairs of life, and a constant struggle with the interests and passions of men, almost inevitably produce,"[17] and from which he returned to his work rested and refreshed and ready for whatever came his way.

Such were the things that gave Curtis fame as an advocate. As Reverdy Johnson, himself one of America's most distinguished lawyers, put it, Curtis' "arguments at the bar possessed . . . sterling merit. The statement of his case, and the points which it involved, were always transparently perspicuous. And when his premises were conceded or established, his conclusion was necessary sequence. His analytical and logical powers were remarkable. In these respects, speaking from the knowledge of the great men whom I have heard during a very long professional life, I think he was never surpassed. . . . He was always calm, dignified, and impressive, and, therefore, persuasive. No lawyer who heard him begin an argument ever failed to remain until he had concluded."[18]

Gaspar-Ware

Richard H. Leach is a staff associate for the Southern Regional Education Board. A graduate of Colorado College (A.B. 1944), he holds a Ph.D. from Princeton and was formerly an assistant professor at the Georgia Institute of Technology.

And Curtis himself once wrote out his own rules for successful practice. They are still wise advice.

> Pay little attention to the good side of the case at first, that side will take care of itself, but be sure you look well to the bad side—not forgetting to explore the strongest form of proof, and knowing that an opportunity to prove even what is false may be used by your adversary, unless you have certain means to refute it.
>
> Never try to disprove what has not been proven, and supply thereby the missing link in the enemies' chain of evidence.
>
> Never forget that an innocent person, with enemies, may be in a more dangerous position than a guilty one with friends and influence.
>
> The pulse of the people beat nearest together through the columns of the press, and a few wicked papers may tell a jury much in half-accounts of an occurence that will shade the whole story of it unawares.

11. *Remarks of Abraham Payne*, MSS. Papers of the Class of 1829, Harvard University Archives.
12. *Ibid.*
13. Curtis, Memoir, *op. cit.* 84.
14. *Argument of B. R. Curtis, Esq. . . . in the case of Francis O. J. Smith, Complain't vs. Hugh Downing and als., Respon'ts* . . . (Portland, Me., 1850), page 43.
15. Remarks of George T. Davis, MSS. Records of the Class of 1829, page 197, Harvard University Archives.
16. Benjamin R. Curtis to George Ticknor, September 22, 1833, *op. cit.*
17. Benjamin R. Curtis to George Ticknor, October 22, 1837, Curtis, Memoir, *op cit.*, volume 1, page 78.
18. Remarks of Reverdy Johnson, 87 U.S. vii (1873-74).

Persistent energy in the face of genius and eloquence will bear its fruit in due season if properly directed, but endless travel in the wrong direction will never reach the place of destination; therefore, of all things, be safe in your theory and start out equiped [*sic*] for a trial of hardships.

The best trial rule I can think of is for the advocate first to possess himself thoroughly of the facts of his case, and to believe in its justice; then to keep in mind in every step of its progress that the jury is composed of men representing the average common sense of the people, actuated by an honest desire to do impartial justice between the parties; and so, in the light of this fact, to be able to see how every proposition or objection, piece of testimony, remark at the Bar, or observation from the Bench, would be likely to affect such a body; in other words, for the trial lawyer to imagine himself in the jury box, with their purposes and intelligence, and think how these things would influence him.[19]

That careful observation of those rules, and of his tried and true modes of procedure, worked well for Curtis is made manifest both by his financial success at the Bar—he earned approximately $750,000 from the practice of the law in his lifetime—and by the height of his personal reputation, one example of which is very illustrative. In 1851, when Secretary of State Daniel Webster sought counsel to aid the United States District Attorney in Boston prosecute the first of the so-called Rescue cases, in which the constitutionality of the newly passed Fugitive Slave Act was to be tested, he recommended B. R. Curtis for the job. It was of the utmost importance, Webster wrote the District Attorney, that those causes be "conducted by the best talent and experience of the bar . . . [by] the very first assistance which the Profession can furnish". "You must be fully aware of the consequences," he cautioned, "if just decisions should fail to be obtained through any want of skill on the part of those who manage the trials."[20] Curtis' other engagements prevented him from accepting the invitation, but there was no doubt who stood at the head of the Bar in Daniel Webster's mind.

Perhaps an even greater tribute to Curtis was the words John Torrey Morse, Jr., used in his praise after his death. "He was one of the very few members of the profession, either in England or in this country", Morse declared, "who . . . vindicated the real greatness of the law, and . . . justified its final supremacy over all the rights and all the affairs of civilized men. In his hands the science took its proper character, as that of perfect clearness and fundamental right. Subtlety and intricacy vanished like noxious vapors beneath the powerful sunlight which he sent over and through his subject, and into its every darkling corner."[21] That quality of clearness—the core of Curtis' method—gave him, as Webster said it did, "great power at the bar",[22] and so it will to others who can but achieve it. And the rewards to those who are successful can be just as great, or greater, than those which came to Curtis.

19. Quoted in Henry W. Scott, DISTINGUISHED AMERICAN LAWYERS (New York, 1891) pages 280-1.
20. Daniel Webster to George Lunt, April 4, 1851, 16 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER. (National edition, Boston, 1903) 603.
21. John T. Morse, Jr., *Benjamin R. Curtis*, 45 ATLANTIC MONTHLY 265 (February, 1880).
22. Peter Harvey, REMINISCENCES AND ANECDOTES OF DANIEL WEBSTER (Boston, 1877), page 117.

Make Your Hotel Reservation Now!

■ The Seventy-Eighth Annual Meeting of the American Bar Association will be held in Philadelphia from August 22 to August 26, 1955. Further information with respect to the schedule of meetings appears in this issue of the JOURNAL beginning at page 152.

Attention is called to the fact that many interesting and worthwhile events of the meeting will be arranged, as usual, to take place on Saturday and Sunday, August 19 and 20, preceding the opening sessions of the Assembly and the House of Delegates on Monday, August 22.

Requests for hotel reservations should be addressed to the Reservation Department, American Bar Association, 1155 East Sixtieth Street, Chicago 37, Illinois, and should be accompanied by a payment of $10.00 registration for *each lawyer* for whom reservation is requested. *Be sure to indicate three choices of hotels* and give us your definite date of arrival as well as probable departure date. *All space at the Bellevue-Stratford, the Headquarters Hotel, is exhausted.* Reservations will be confirmed approximately ninety days before the meeting convenes.

More detailed announcement with respect to the making of hotel arrangements may be found in the January issue of the JOURNAL at page 11.

Attorney for the Government:

The Work of the Solicitor General's Office

by Simon E. Sobeloff · *The Solicitor General of the United States*

■ "The Solicitor General, though an advocate, must not forget that his client is the United States Government. . . . Under our system he has a special relation to the courts and in particular to the Supreme Court." These words from Mr. Sobeloff's article account for many of the perplexities that our nation's second-highest legal officer must face. This excellent discussion of the work of the Solicitor General is taken from an address delivered before the Judicial Conference of the Fourth Circuit last summer.

■ One can hardly cross the threshold of the Solicitor General's Office without instantly sensing the wide range and entrancing interest of its business. A lawyer could spend a lifetime in active practice in Baltimore and never have occasion to think about the so-called aboriginal land rights of the Alaska Indians or the conflicting water claims of cities and states. He might never be called upon to decide whether the marriage of a fourteen-year old girl in Arkansas is void or only voidable, or to consider a railroad's liability for burning a national forest, or what type of evidence is sufficient to prove the paternity of a Chinese claiming American citizenship; or whether giving away calves involves realization of taxable income. Hardly would he find it necessary to consider whether the Government is liable for the killing of Indian ponies and driving the Indians off certain grazing lands in Utah, or whether a forced sale of radar equipment to the American Army in the Philippines involves a condemnation for which just compensation is due. He might never give thought to what practices are appropriate in weighing cattle arriving at the Chicago stockyards, or whether the waters between the Island of Catalina and the mainland are a part of California, or what is the authority of the Federal Power Commission over natural gas production, or whether Congress has admitted liability of the United States to the State of California for recruiting expenses in the Civil War.

Nor is he likely to be called upon to try his hand at drawing a decree in anything resembling the Segregation cases.

Yet these exemplify the typical nature of matters that arise in the Department. They also illustrate the vast expanse and diversity of our country and its operations throughout the world. The number of requests made to the Solicitor General to petition for or to oppose certiorari runs to more than a thousand a year, and the number to permit review in the Courts of Appeals is even greater.

Naturally there is a shift in perspective when one changes his position. The work in the Solicitor General's Office is different from that on the Bench or at the Bar in private practice.

Judges will perhaps agree that one of the chief joys of their office is to be able to witness a good stiff fight, sometimes even to participate tangentially, while decorously maintaining strict neutrality with no partisan anxiety over the outcome.

The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory, but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts.

When a lawyer in private practice advances an argument, he feels free to drive as far as he can. He is out to win that case. He has, it is true, his professional ethics, but he has no responsibility for the future of the law. He is not fashioning a rule for later cases. Provided only that his contention is not so extreme as to arouse resistance, he is free to go as far as he will. But the judge writing the opinion must, as you know,

be more wary. He must proceed with greater moderation and circumspection, realizing that what he says today will have to be faced tomorrow. He is aware that a rule declared in one case may be cited in the next. Unlike the lawyer, the judge is confined by his sense of responsibility for the symmetry of the law and by his obligation to maintain its continuity and conformity to basic principles and traditions.

The Solicitor General . . . *Attorney for the Government*

The Solicitor General, too, though an advocate, must not forget that his client is the United States Government, which is dedicated to the same principles. Under our system he has a special relation to the courts and in particular to the Supreme Court. It is out of this multiple relationship that the Solicitor General's perplexities arise.

A chief problem is how to reconcile legality with decency and justice. He has a delicate and not easily definable function in the development of the law. He must be mindful of all of these things in deciding which cases shall be appealed from District Courts to the Courts of Appeals and which merit presentation to the Supreme Court.

I do not have the exact statistics and they are not necessary: It is sufficient to point out that only a small fraction of the cases lost by the Government are appealed. In the first place, government lawyers, like those in general practice, may experience that marvelous adjustment of perspective which often comes to the most ardent advocate when he loses —that is, the realization that he really should have lost. Sometimes the realization comes with the suddenness of revelation. Sometimes, when the trial judge or the Court of Appeals seems to have deviated from the law, and it is nevertheless apparent that this was done in an understandable human effort to square what is legal with what is just, the Solicitor General, finding no great importance in the case as a precedent, may well look the other way and say "no appeal" or "no certiorari".

A government lawyer was telling me with a show of shock and dismay that in a certain case Judge John J. Parker declared from the Bench "Well, if that is the law, any Judge worth his salt will find some way to overcome it". I wasn't shocked, for if I must make a choice between a judge who is completely orthodox and applies without imagination or feeling a rigid rule and another judge who is perceptive of the justice and common sense of the case, even at the expense of some harmless departure from the strictness of the legal formula, I prefer the latter.

I know that you will not misunderstand my meaning. I am not counseling experienced federal judges to become anarchists: I merely say that if you find a way to do justice in a hard case, *sometimes*, not always, the Government may find a way not to appeal. I say "not always" for it often happens that despite our personal preferences in the instant case, we deem it necessary to appeal because of the harm apprehended from the operation of the prescribed rule in a wider orbit.

We can submit, in an appropriate case, without appealing or without seeking certiorari where the Government has *lost* below; but what do we do when we have *won* a bad case and the opponent carries the matter up on appeal or by petition to the Supreme Court? Do we resist, or do we confess error? In the nature of things we can not often confess error, for even the passion for justice would not overcome the annoyance of the lower courts if we too often confessed error in cases where they had ruled in our favor. One district judge, reversed on appeal, suggested, when the Solicitor General refused to seek certiorari, that he, the district judge, should have the right to personal vindication by applying for certiorari himself. District judges and appellate judges might view the matter differently.

There have been instances, and doubtless there will be more, where confession of error is not only in order but is a moral necessity. In this connection I may relate the experience of a young lawyer on the Solicitor General's staff, who went into court and confessed error, but the court nevertheless gave him an unwelcome decision for the Government. He came back moaning and gloating simultaneously, and said "I can't lose a case even when I try."

What impresses me, and depresses me, is that so often neither Government counsel nor the court are given the necessary leeway to soften harshness and mitigate absurdities which are inexorably commanded by the law. What federal judge has not been torn in his heart by the inflexible minimum penalty prescribed in certain statutes? Recently I attended the Judicial Conference of the Fifth Circuit. Half of an entire session was devoted to the recital of instances of unconscionable penalties under the Boggs Anti-Narcotic Act. One judge told of a case where a highly respected pharmacist, with no prior record, violated the law by giving someone a small quantity of a narcotic drug to relieve acute suffering. He did it for no personal gain, but for humanitarian reasons, expecting that a doctor's prescription would follow. The evidence of the violation, however, was entirely clear and the jury was about to bring in a verdict of guilty. The judge related how he sent them back after explaining that if they convicted the defendant he would have no choice but to impose a minimum two-year sentence. The jury then considered the matter further and brought in a verdict of "not guilty", to the immense relief of the judge. Of course, this is not an edifying story; but who can fail to sympathize with a judge put in such a difficult position by a rigid law passed by men of good motives who fail to foresee and understand the consequences of their legislation?

Similarly, in some of the immigration and naturalization cases, both the law and its administration have, I fear, gone far beyond what would appear necessary to carry out policy, and needless hardships are being inflicted. Admittedly, the remedy can-

not be supplied by judges alone. The Congress has broad powers in this area. Insofar as administration plays a part, Attorney General Brownell is already moving to relieve the abuses in bail procedures and more will be done, I am sure, under the new Commissioner of Immigration and Naturalization, General Swing, who combines with his army discipline a warm and understanding heart.

This brings me to the more general, still unresolved problem of the role of the courts in the review of administrative action. This I see exemplified again and again in the steady stream of papers that flow across my desk.

It is a difficult dilemma: On the one hand is the obligation to respect the separation of powers, for the disregard of this principle would itself lead to tyranny. Personalized judgments to meet particular cases are, we know, fruitful sources of future trouble. We must take care that that which satisfies the felt need today shall not breed confusion tomorrow. On the other hand is the limited but still broad role of the judiciary in determining whether fundamental rights guaranteed by the Constitution have been violated by the arbitrary exercise of power.

It has been pointed out that the due process clauses of our fundamental law are unique among national constitutions, even in the English-speaking countries. Yet this is an established feature of our constitutional system. In appropriate cases the power must be exercised with firmness and vigor, albeit with discretion. Experience has shown what is likely to happen when a court declines to interfere, out of deference to the separation of powers, even though the administrator has acted harshly, cruelly and outrageously. These are not my characterizations; the Supreme Court used them in a recent case, where it castigated the action under review, but upheld its legality. In that case the action was mandatorily required by the statute, but sometimes administrators go to great extremes in what they think is a proper exercise of discretion. Only too often the administrator's ears tune out these denunciations; he hears only that his conduct is *legal* and he feels that he has been granted a license to continue in his course and go even further till checked. Each branch of our Government is limited by the others, but each must on occasion check the others if justice is to be achieved. In deciding in a given case whether to appeal the action of the reviewing court, these are among the pertinent considerations.

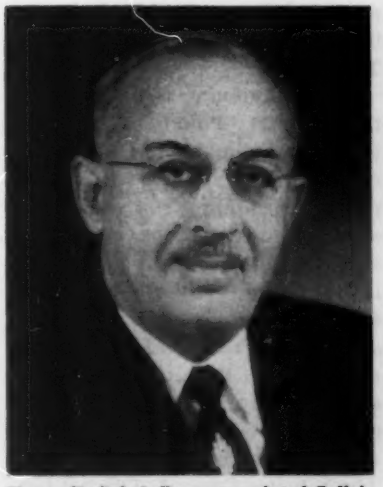
The *Southland Manufacturing Company* case (201 F. 2d 244) in the Fourth Circuit illustrates well that the Administrative Procedure Act failed to supply the hoped-for guiding test as to how the reviewing judge determines whether or not to substitute his judgment for determinations of fact by administrators. As you know, that case evoked sharply divergent views by two of our most respected jurists, Judge Parker and Judge Soper.

What Cases To Appeal . . . *Dealing with the Agencies*

A sometimes bothersome feature of the Solicitor General's duty of deciding what business to present to the Supreme Court is in dealing with the government agencies concerned. His is the task of resisting their tearful importunities to seek review of cases they have lost. The loss seems to them calamitous. Their preoccupation is with the immediate result, or at least their purview is likely limited to their particular work. The Solicitor General must seek a broad perspective of the total law business of the United States, not merely the program of any single agency.

A principal task of the Solicitor General is to determine when not to press for a victory in court, for sometimes a victory may prove more disastrous than a defeat. And what lawyer of experience has not noted that there are occasions when it is wiser to leave a point obscure than to obtain clarification?

Dealing with the agencies is, however, the less difficult part of the job.



Simon E. Sobeloff was appointed Solicitor General in February, 1954; before that time, he was Chief Judge of the Court of Appeals of Maryland. He has had considerable experience in public service since his graduation from the University of Maryland Law School in 1915.

After listening to them, we can "tell them". Our relation to the Supreme Court presents problems of greater complexity.

The Solicitor General decides in many instances finally what questions shall not come before the Supreme Court, and he must therefore address himself to the inquiry, "what kinds of legal problems does the Court wish to entertain?"

The Court, as you know, does not customarily declare its reasons for granting or denying certiorari. There are nine minds that have been known to disagree, and none has fully revealed itself. We know that different approaches are possible. One justice may vote to grant or deny certiorari for one reason, and another may agree with him for an entirely different reason. We are told on the highest authority that denial means nothing more than that four favorable votes were not available. Under these circumstances, how is the Solicitor General to divine the over-all plan of the Court in the selection of cases? There is no pat answer, for there are no clear criteria. What is a case for the Court is

not precisely measurable. It has to be felt; it cannot be demonstrated. There are many surprises.

At the beginning of the last term the Federal Power Commission joined with the Phillips Petroleum Company in petitioning for certiorari to settle an important question as to the jurisdiction of the Commission in the regulation of the natural gas industry. The petition was denied. Phillips then filed a motion for reconsideration. The Government declined to join in this motion out of deference for the rule which forbids motions for reconsideration except where new matter is to be presented. The Solicitor General's Office is perhaps more scrupulous in observing this rule than are some others. To the surprise of the profession, certiorari, though previously denied, was granted.

Again, a man convicted by the state courts of New York of murdering his parents sought to raise by certiorari the validity of his confession. He claimed that with the connivance of state officers a psychiatrist ostensibly called to treat him extracted the challenged confession. Certiorari was denied. Nevertheless, most unexpectedly the Supreme Court saw fit to review the same question when it was raised by the same defendant on habeas corpus in a federal court.

Shortly after coming to Washington I paid courtesy calls on each of the justices. No two seemed to have exactly the same standards for certiorari; most of them said frankly that the standards defy formulation. One justice told me that the sum involved had little weight with the Court, but that he personally was influenced by that factor. I asked him what was the dividing line, and he answered quite seriously that when he saw the Government lose 20 million dollars he thought the case might be worth looking at! He spoke this as one might confess a personal idiosyncracy.

The Court may reject a case, not because the question is unimportant, but because it thinks the time not ripe for decision. In our system the Supreme Court is not merely the adjudicator of controversies, but in the process of adjudication it is in many instances the final formulator of national policy. It should therefore occasion no wonder if the Court seeks the appropriate time to consider and decide important questions, just as Congress or any other policy-making body might. For example, for several years before taking the School Segregation cases the Court repeatedly turned away opportunities to decide questions in that area, *perhaps* because they deemed them premature. Lately it declined to review a ruling on segregation in public housing, *perhaps* because the Court thought it best, after deciding the School cases, not to say more on other aspects of segregation at this time. Or the Court may think the record in the case at hand not adequate or otherwise unsuitable to raise and decide the point. We can only speculate. In the decision of great constitutional questions, especially those which are in the realm of political controversy, timing can be of supreme importance.

One can hardly fail to be impressed with the growing finality of the Courts of Appeals of the several circuits in the disposition of ordinary litigation. The Supreme Court has in late years steadily decreased the number of cases it will consent to hear, limiting the volume of business within its discretionary jurisdiction under the Act of 1925. Last term it granted 88 certioraris, as compared with 193 in 1940. Only 8 per cent of the petitions filed were accepted as against 22 per cent in the earlier year. As to cases heard and submitted there were but 116, while in 1940 there were 204. Ten years earlier there were 267.

Of the 88 certioraris granted 52, or two thirds of the total, were brought by or against the Government. Of certioraris sought by the Solicitor General only 40 per cent were granted—a decline from 80 per cent of such petitions granted only a few years ago. It is significant that the Solicitor General himself had severely culled the cases and applied for certiorari in substantially less than half of those in which some Government agency urged him to do so, in fact in about 12 per cent of the total cases lost. Still the mortality in the residue was more than half. Private lawyers were successful in only 6 per cent of their petitions for certiorari.

The Supreme Court's Task . . . *Keep the Ship on an Even Keel*

Plainly, the Supreme Court does not consider that it would make the best use of its time and energy if it were to serve merely as another appellate court. Almost a quarter of a century ago, Chief Justice Taft declared that a litigant is entitled to one appeal, not two. Even a conflict between the circuits is no infallible assurance of favorable action on a petition. Increasingly the justices seem to regard their function as that of a gyroscope to keep the ship on an even keel, confining themselves more so than in the past to the consideration of grave national issues.

Tax litigation, so prolific a decade ago, appears now almost dried up. One justice told me that the place to seek corrections in tax law is Congress, even when a Court of Appeals seems to have misinterpreted a statutory provision. Nevertheless, at the end of its October, 1953, term the Supreme Court unexpectedly granted a whole series of certioraris in criminal net-worth cases and reinstated a number of such cases previously declined.

The office of the Solicitor General is not exempt, for there is no exemption, from the anxieties which attend any serious undertaking. Intertwined with these, however, are deep satisfactions, as you must perceive from what I have already said.

Mr. Justice Jackson, when he was Solicitor General, once told of a letter addressed to "The Celestial General", Washington, D. C., and he rejoiced in the fact that the Post Office had no difficulty in determining that it should be delivered to him. I do not lay claim to "celestial" recognition, but there are solid com-

(Continued on page 279)

The New Revenue Code:

Personal Exemptions and Deductions

by Martin H. Webster ..*of the California Bar (Los Angeles)*

■ Among the members of the Section of Taxation who participated actively in the drafting of the 1954 Internal Revenue Code was Martin H. Webster, Chairman of the Subcommittee on Personal Exemptions and Medical and Child Care Expenses of the Committee on Federal Income Taxes. At the present time, the Committee has many subcommittees which are working hard on the proposed new Treasury Regulations. Succeeding issues of the Journal will carry articles by these subcommittee chairmen. This series on the new Code is being prepared under the supervision of the Publications Committee of the Section, John W. Ervin, Chairman. The committee is anxious to have comments from readers of the Journal on the value of the articles. Comments sent to the editor will be forwarded to Mr. Ervin.

I.

The Personal Exemptions

■ Section 151 of the Internal Revenue Code of 1954[1] substantially adopts the prior law found in Section 25(b)(1) of the 1939 Internal Revenue Code, but also liberalizes the deduction in favor of the taxpayer claiming an exemption because of a dependent. As in the past, the deduction for exemptions is taken as a credit against taxable income and is available whether other deductions are itemized or whether the optional standard deduction is taken.

The taxpayer is entitled to a $600 exemption for himself[2] with additional $600 exemptions if he has attained the age of 65 years before the last day of the taxable year[3] or is then blind.[4] If a joint return is filed, each spouse is a taxpayer. If he files a separate return, the taxpayer may, in addition, claim a $600 exemption for his spouse if she has had no gross income for the calendar year in which the taxable year of the taxpayer begins and was not the dependent of another taxpayer during such year.[5] The taxpayer is entitled to additional $600 exemptions if his spouse is either 65 or blind.[6]

The foregoing is the same as under prior law. While it would have been desirable for the Code to have undertaken to define the term "spouse", it does not do so beyond stating that an individual legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.[7] Two recent cases have considered the effect of interlocutory decrees of divorce on the marriage relationship and have held that a marriage is not terminated for tax purposes if the interlocutory decree does not in itself terminate the marriage under state law.[8] While neither of these cases was concerned with the allowance of the personal exemption, their reasoning would seem equally applicable. Thus, it would appear that if the final decree of divorce had not been entered prior to the close of the taxpayer's taxable year, the taxpayer would be entitled to the additional exemptions for his "spouse", assuming the other requisites were met.

Additional exemptions of $600 are allowed for each dependent[9] (1) whose gross income for the calendar year in which the taxpayer's taxable year began is less than $600 or (2) who is a child of the taxpayer and has not attained age 19 at the close of such calendar year or (3) is a student.[10] It is in this area that the 1954 Code liberalized the deduction. First, if the additional exemption is claimed for a dependent child[11] who is less than 19, it no longer is required that such a child have gross income of less than $600. The limitation on income also does not apply in the case of a dependent child who is a student even though he has at-

1. All references are to the 1954 Code unless otherwise noted.
2. § 151(b).
3. § 151(c)(1).
4. § 151(d)(1).
5. § 151(b).
6. § 151(c)(2) and (d)(2).
7. § 153, 6013 and 7701(a)(17).
8. *Eccles* v. *Comr.*, 208 F. 2d 796 (4th Cir. 1954); *Evans* v. *Comr.*, 211 F. 2d 378, (10th Cir. 1954). Both of these cases held that the entry of an interlocutory decree of divorce did not dissolve the marriage so as to prevent the filing of a joint return.
9. The term "dependent" is defined by § 152.
10. § 151(e)(1).
11. The term "child" means an individual who is a son, stepson, daughter or stepdaughter of the taxpayer. (§151(e)(3)).

tained the age of 19. But the income of a child can still operate to defeat the allowance of an exemption if by his income the child is deemed to have furnished at least one half of his own support.[12] The exemption is also denied as to any dependent if such dependent is married and filed a joint return with his spouse.[13]

The Code also expressly defines the meaning of the term "student".[14] While the definition is quite broad, it is not all-inclusive. Thus, correspondence school studies, part-time day or night school studies, or employee training courses do not qualify a dependent as a "student" within the definition of Section 151 (e) (4).[15] Probably the meaning of the term "student" will be limited to dependents who attend full-time at primary and secondary schools, preparatory schools, colleges, universities, normal schools, technical and mechanical schools having regular faculties, established courses of studies and an organized student body in attendance, or who attend full-time on-the-farm training programs under the supervision of an educational institution of the state or political subdivision thereof.[16]

II
Dependents Defined

In general, a dependent is one who stands in one of the enumerated relationships to the taxpayer *and* who receives over half his support from the taxpayer for the calendar year in which the taxable year of the taxpayer began.[17] Thus, the 1954 Code in defining the term "dependent" has retained the dual tests of relationship and support which were used under prior law. However, the new Code has added two new classifications to the "relationship" list and has eased the support requirement in several particulars.

A. The Relationship Test

The 1954 Code expressly sets out, as did its predecessor, the relationships required.[18] In addition to the relationships which formerly qualified and which were carried over into the 1954 Code, two new classifications have been added. First, an individual who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household, qualifies as a dependent insofar as the relationship test is concerned.[19] This provision adds a new concept to the tests for dependency in that no relationship by blood or marriage between the taxpayer and the dependent is required. The provision was enacted to permit greater flexibility. Thus, an exemption will be allowed to a taxpayer who supports in his home a foster child or a child awaiting adoption.[20] However, the exemption attaches only if the principal place of abode of the "dependent" is the home of the taxpayer. In defining the concept of a "home", the committee reports state that a mere temporary absence will not disqualify this exemption nor will the fact that the dependent lives away from the taxpayer's home during a school term; but if the dependent in fact establishes a separate habitation and only returns for periodic visits, the exemption will be disallowed.[21]

The second new classification is added by subsection 10 of Section 152 (a) and permits a taxpayer to claim an exemption if he supports a cousin who, for the taxable year of the taxpayer, requires institutional care because of mental or physical disability and who, before receiving such care, was a member of the same household as the taxpayer. Two things should be noted with respect to this section. The exemption is allowed only as to blood cousins although the degree is not important. Secondly, the Code here uses language not found elsewhere in requiring only that such cousin be a member of the *same household as the taxpayer,* rather than a member of *taxpayer's household.* It is not clear whether there is a substantive difference between the two terms, but the Code is open to the interpretation that an exemption would be allowed to a taxpayer who supports a cousin where they were both from the same household even though such household was maintained by a third person.[22] When issued, the Regulations may clarify this point and should therefore be examined.

B. The Support Test

In general, it is still required that the taxpayer claiming a dependency exemption must furnish over one half the support of such dependent. This requirement has been eased, however, in two situations.

If the dependent is a son, stepson, daughter or stepdaughter of the taxpayer and is attending an educational institution, as defined by Section 151 (e) (4), any amounts received by such child as scholarships for study shall be ignored in determining whether the taxpayer furnished over half the support.[23] While no definition of "scholarships" is given, it would seem to include almost any payment which enables the child to pursue his studies.[24] However, tuition payments and subsistence allowances to a veteran under the "GI Bill" are not considered to be amounts received as scholarships.[25] Again, the Regulations when issued may clarify this point and should be consulted.

The second liberalization is of

12. See § 152(a) and (d) defining "dependents" and see discussion *infra*, Part II.
13. § 151(e)(2). The language of the Code should be noted carefully; the exemption is denied if the dependent filed a joint return for the taxable year beginning in the calendar year in which the taxable year of the taxpayer began. Thus, in the case of certain taxpayers, it would be possible to claim the dependency exemption even though the dependent also filed a joint return with his or her spouse. Whether a dependent earning more than $600 may himself take a $600 exemption on his own return is not determined by the Code, although the assumption has tacitly and universally been made that the answer is in the affirmative.
14. § 151(e)(4).
15. Senate Committee Report, page 20, page 193.
16. *Id.*
17. § 152(a).
18. § 152(a).
19. § 152(a)(9).
20. Senate Committee Report, page 21 and page 194.
21. *Id.*, page 193.
22. A search of the Committee Reports of the House, Senate and Conference Committees was unfruitful as to whether a different test was actually contemplated by Congress, but see Research Institute of America, 1954 Revenue Act Coordinator, ¶ '54 A-406.
23. § 152(d).
24. The term "scholarship" seems to be given a broad meaning—see the House Committee Report, page A43 and Senate Committee Report, page 195 stating scholarships "from whatever source derived and however paid" shall not be considered.
25. Senate Committee Report, page 195, House Committee Report, page A43.

more general application. Several taxpayers often contribute jointly to the support of a person without any one taxpayer contributing over half the support. Under prior law none of the contributing taxpayers was entitled to an exemption since none of them met the "over half the support" test.[26] Under Section 152 (c) of the 1954 Code one of such taxpayers may claim the exemption if:

> (1) No person contributed over half the support; (2) the person receiving support would be a dependent of each member of the group supplying the support but for the "over one-half" support test; (3) the taxpayer contributes over 10% of the support of such person; and (4) all other taxpayers who contributed over 10% of such support file a written statement that they will not claim such person as a dependent.

To equalize the benefit, the taxpayers so contributing may rotate the dependency deduction amongst themselves each successive year, since the election required under Section 152 (c) (4) must be made yearly and does not purport to extend beyond the year for which it is filed.

This new provision should prove to be a handy tool in the drafting of child support provisions in property settlement agreements where the child is in the custody of one parent but the other also furnishes part of the support. Under the prior Code it often happened that neither party could claim the exemption since neither could prove that he or she furnished over one half the support.[27] Under the 1954 change, however, the agreement itself can provide for this contingency and set forth which of the parties shall be entitled to take the exemption or can provide that the exemption be alternately claimed by the parties, and bind the party not entitled to the exemption to file the necessary waiver.

III
Medical and Dental Expenses

The 1954 Code did not work any fundamental change in the allowance of a deduction for the expenses of medical and dental care paid by the taxpayer, but it did liberalize the allowance of the deduction in part by easing both the minimum and maximum limitations. Under the new Code, a taxpayer who itemizes his deductions can claim as a deduction his expenses paid for the medical care of himself, his spouse or dependents, to the extent such expenses exceed 3 per cent of his adjusted gross income.[28] The prior law used a 5 per cent floor.[29] If either the taxpayer or his wife has attained the age of 65 by the close of the taxable year, the 3 per cent limitation does not apply to medical care expenses of the taxpayer or his spouse but does apply to expenses paid for care of his dependents.[30] A change has been made, however, in the method of including expenditures for drugs and medicines as part of the total expense of medical care; such expenditures are allowed only to the extent they exceed 1 per cent of the adjusted gross income.[31] Thus, two calculations are now necessary; the first to determine how much of the expenditures for medicines and drugs is includible in the medical care expense and the second to compute the allowable deduction because of such medical care expense. Form 1040 has been revised to provide for this. In general, the expenses which qualify as expenditures for medical care are the same as under prior law.[32] In one respect, however, the deduction has been tightened. It is now clear that the expenses for medical care will include only the cost of transportation where travel for health purposes is undertaken on doctor's orders, and that the expenses of food and lodging will no longer qualify, except where charged as part of a hospital bill.[33]

The 1954 Code also increases the maximum a taxpayer may deduct. Under prior law he was limited to $1250 times the number of exemptions allowed for the taxable year (except those for age or blindness), with an over-all limitation of $2500 for a single taxpayer or one filing a separate return or $5000 for married

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taxpayers filing jointly or a single taxpayer filing as head of household. The 1954 Code doubles these ceilings and also allows a $10,000 maximum to a taxpayer who qualifies as a surviving spouse under Section 2 (b).[34]

Medical expenses paid out for a decedent by his estate formerly could be deducted for estate tax purposes only. Section 213 (d) now permits such expenses to be deducted on the decedent's income tax return for the taxable year in which such expenses were incurred if (1) the expenses are paid by the estate with-

26. *Blankman*, 11 TCM 1166 (1952); *Lycan*, 10 TCM 278 (1951).
27. *Lycan*, 10 TCM 278 (1951).
28. § 213(a)(1). As to other possible treatment of medical expenses for certain dependents, see footnote 51 and related text.
29. § 23(x) of 1939 Code.
30. § 213(a)(2).
31. § 213(b). Note also that there has been no change in the rule that such expenditures must be for medicines and drugs as distinguished from toiletries and sundries. Medicines and drugs need not be obtained on a doctor's prescription (Senate Committee Report, page 219).
32. § 213(e).
33. § 213(e)(1); Senate Committee Report, page 219; House Committee Report, page A60. Cf. under prior law *Watkins*, 13 TCM 320 (1954). And see I.T. 1946-1 CB 75 for travel of parent to accompany a child.
34. § 213(c).

in one year after his death, and (2) if allowable as an estate tax deduction, the estate files a waiver of the right to claim such expense as an estate tax deduction. In many instances this provision may prove quite beneficial due to the difference in income and estate tax rates. Of course, if the net taxable estate is below the minimum amount subject to estate tax, a definite advantage could be gained by claiming such expenditures as a medical deduction on the decedent's income tax return. Note, however, that these expenses are treated as a part of the medical expense deduction and therefore are subject to the limitations set forth in Section 213 (a).[35] Where the statute of limitations permits, prior years' returns may be amended under this Section.[36]

IV
The "Care of Dependents" Deduction

Section 214 of the 1954 Code enacted into law a new relief provision aimed at benefiting those taxpayers who are compelled to expend sums for child care to enable the taxpayer to be employed.

Subject to the limitations hereinafter noted, a taxpayer who is a woman or a widower, and who itemizes deductions, may claim as a deduction expenses paid during the taxable year for the care of one or more "dependents", if such care is for the purpose of enabling the taxpayer to be gainfully employed.[37]

Both employment by others and self-employment qualify and the House and Senate reports also indicate that expenses incurred while looking for work qualify for the deduction.[38] The deduction is limited to sums actually paid for child care and cannot exceed $600 in any one year regardless of the number of dependents.[39] Nor can the deduction be claimed as to payments made to any person with respect to whom the taxpayer is allowed for his taxable year a deduction under Section 151.[40] The term "widower" is here defined to include an individual who is legally separated from his spouse under a decree of divorce or separate maintenance[41] as well as a man whose spouse has died and who has not remarried.[42] Any woman who is working is entitled to the deduction; however, if she is married the deduction will not be allowed unless she files a joint return with her husband and in such event the deduction is reduced by the amount their combined adjusted gross income exceeds $4500.[43] The limitations on a married woman do not apply, however, if her husband is incapable of self-support because mentally or physically defective.[44] Section 214 (c) (3) provides that a woman is not considered to be married if at the close of the taxable year she is legally separated from her spouse under a decree of divorce or of separate maintenance. In those states providing for an interlocutory decree, a woman probably will be considered married unless the final decree had been entered prior to the close of her taxable year.[45] In such a case, the limitations of Section 214 (c) (2) would be applicable.

Although this deduction has come to be commonly known as the "baby sitter" or "child care" deduction, it is actually not so limited. The taxpayer may deduct expenses paid for the care of any dependent for whom the taxpayer is entitled to an exemption under Section 151 (e) (1) and who (1) is the taxpayer's son, stepson, daughter or stepdaughter and under the age of 12 years, or (2) who is physically or mentally incapable of caring for himself.[46] Thus, under the latter provision, a taxpayer who hires a nurse to care for an aged mother could deduct such expenses under this provision if all other requirements were met. Nor is there any requirement that the dependent be cared for at home; thus, payments to a nursery school, or a rest home or hospital, would seem to qualify if made for the purpose of freeing the taxpayer for gainful employment.[47]

The deduction, however, will be limited to the expenditures actually made during the time the taxpayer is gainfully employed or seeking such employment or during the time a dependent qualifies under Section 214 (c). Thus, if the taxpayer is gainfully employed or seeking employment for the months of January through June, only expenditures made during such months may be considered for the deduction even though such expenditures were less than $600 and further expenses were incurred after the month of June. Also, if a child should attain 12 years of age during the year, only those expenses incurred prior to his twelfth birthday are to be considered; however, if there are other children under twelve the entire expenses paid during the year for all children can be considered as no allocation to each child is required.[49] And where a maid or housekeeper is hired to perform other household duties as well as care for the children or other qualified dependents, an allocation of the amounts paid to her must be made on the basis of the time she spends on her several duties and only that portion attributable to the care of the children or dependent is deductible.[50]

As is the case with all deduction, the importance of keeping adequate records cannot be over-emphasized as the burden will be upon the taxpayer to show how much was actually expended for the care of dependents.

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35. § 213(d)(1) provides: *"For purposes of subdivision (a), expenses for the medical care of the taxpayer . . ."* (Emphasis added).
36. Senate Committee Report, page 219.
37. § 214(a).
38. House Committee Report, page A61, Senate Committee Report, page 221.
39. § 214(b)(1)(A); Senate Committee Report, page 220.
40. § 214(b)(1)(B).
41. § 214(c)(2). No deduction is available to a married man even though his wife is incapable of caring for a child or other dependent since he is not a widower within this provision.
42. Senate Committee Report, page 220.
43. § 214(b)(2).
44. *Id.*
45. See *supra*, note 8.
46. § 214(c)(1).
47. Research Institute of America, 1954 Revenue Act Coordinator, par. '54J600.
48. Senate Committee Report, page 221.
49. *Id.*
50. *Id.*

The medical expenses of caring for a dependent (as defined in Section 214) may be considered in computing the deduction under Section 214, but any expenses allowed as part of such deduction cannot be used in computing the deduction for medical expenses under Section 213.[51]

Almost all the changes made by the 1954 Code in the area of personal exemptions and medical and child care expenses are more favorable to taxpayers. The liberalizing provisions fall into two major categories: (1) general easing of the tax burden as in the lowering of the medical expense floor from 5 per cent to 3 per cent, and (2) granting relief in hardship situations and easing technical inequities and pitfalls. The work of the Committee on Federal Income Taxes in this area has been in the second category rather than the first, which is primarily the realm of the economists. While a number of the recommendations of this Committee are reflected in the 1954 Code, many suggestions for relief from catastrophic situations are not. Such problems merit continuing attention.

51. § 213(f). The Code is not clear whether an expenditure for medical care of a § 214 dependent may be considered as equally eligible for deduction under §§ 213 and 214, nor whether any excess over the $600 allowable under § 214 may be considered a medical expense under § 213. The purposes of these sections lend to the conclusion both results would obtain.

ASSOCIATION CALENDAR

REGIONAL MEETINGS

Phoenix, Arizona	April 13-16, 1955
Cincinnati, Ohio	June 8-11, 1955
Minneapolis, Minnesota	October 12-15, 1955
New Orleans, Louisiana	November 27-30, 1955
Hartford, Connecticut	April 15-18, 1956

States Included

PHOENIX (Pacific Southwestern Regional Meeting)—Arizona, California, Colorado, Nevada, New Mexico and Utah (Walter E. Craig, General Chairman of Local Committee on Arrangements, Phoenix National Bank Building, Phoenix)

CINCINNATI (Big Seven Regional Meeting)—Illinois, Indiana, Kentucky, Michigan, Ohio, Tennessee and West Virginia (Grauman Marks, General Chairman, St. Paul Building, Cincinnati 2)

MINNEAPOLIS (Northwestern Regional Meeting)—Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota and Wisconsin (W. W. Gibson, Honorary Chairman, Roanoke Building, Minneapolis 2; Ivan Bowen, Co-Chairman, Rand Tower, Minneapolis 2; John B. Burke, Co-Chairman, Minnesota Federal Building, St. Paul 1)

NEW ORLEANS (Deep South Regional Meeting)—Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Oklahoma, Tennessee and Texas (Cuthbert S. Baldwin, General Chairman, Richards Building, New Orleans 12; P. A. Bienvenu, Chairman of Registration and Hotel Accommodations, American Bank Building, New Orleans 12)

HARTFORD (Northeastern Regional Meeting)—Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island and Vermont (Cyril Coleman, General Chairman, 750 Main Street, Hartford 3)

(For information and reservations, write to the chairmen listed above)

BOARD OF GOVERNORS MEETING

Mayflower Hotel, Washington, D. C. — May 16 and 17, 1955

ANNUAL MEETINGS

Philadelphia, Pennsylvania — August 22-26, 1955
(Bellevue-Stratford — Headquarters)

Dallas, Texas — August 27-31, 1956

Committee on the Administration of Criminal Justice

■ Inauguration of a major research study of the administration of criminal justice in the United States, to be directed by a Special Committee of the American Bar Association headed by Major General William J. Donovan (ret.), was announced January 19 by Loyd Wright, President of the American Bar Association. General Donovan is former director of the OSS and former ambassador to Thailand.

Plans for launching the project were discussed in a meeting of the committee in New York in January, attended also by Chief Justice Earl Warren, who is serving as special consultant in the survey. The committee met in General Donovan's offices.

The research project, which has been in the planning stage for more than a year, has been made possible by a grant to the American Bar Foundation by the Ford Foundation. The grant, in the amount of $200,000, was provided to finance the initial stages of the study. In announcing the grant, Mr. Wright, who also is President of the American Bar Foundation, said the American Bar "is proud to be the instrument for carrying out this important study, the object of which is to make justice more certain in this country while jealously protecting the rights of every citizen".

General Donovan described the criminal justice study as perhaps the largest ever undertaken by the legal profession. He said it would be the first definitive study of criminal law administration ever made on a national scale. The project follows closely upon the completion of the new American Bar Center in Chicago, which will be the headquarters of the research staff. While it is planned to be nation-wide in scope, the survey will begin with a pilot project centering in a small number of states not yet designated.

Chief Justice Warren commented that the nationwide study would be "a tremendous task which can be of great benefit to the American people".

"It is a pioneering effort, the first complete study of criminal justice administration ever undertaken", he added. "It will take several years of conscientious work on the part of many people, in every walk of life. But I can think of few projects which the organized Bar could undertake which would equal it in potential benefits. In the end, the study should produce answers to most of the things which have caused the American people to be concerned both for their security and for the preservation of their fundamental rights."

Designed basically as a fact-finding study, the survey will commence with

Members of the Association's Special Committee on the Administration of Criminal Justice are shown in the New York office of Major General William J. Donovan, committee chairman. Left to right: Bolitha J. Laws, Washington, D.C., Chief Judge, United States District Court for the District of Columbia; Warren Olney III, Assistant Attorney General (standing); Arthur H. Sherry, Berkeley, California, Executive Director; Loyd Wright, President of the American Bar Association; Chief Justice Earl Warren, Committee Adviser; General Donovan; Walter P. Armstrong, Jr., Memphis, Tennessee, Chairman of the Criminal Law Section; John A. Pettis, Jr., Berkeley, Assistant Executive Director, and G. Aaron Youngquist, Minneapolis, Minnesota.

on-the-ground field research in the four principal divisions of the system of criminal justice: the police function, the prosecution and defense of criminal actions, the criminal courts, and probation, sentence and parole. The committee believes that the greatest need for the project is the great lack of knowledge and understanding of the actual operation of the system of criminal justice in this country, the practical problems with which it is confronted and the standards of its performance.

The study will not be concerned with causes of crime but with procedures for dealing with it. It contemplates the cooperation of lay and professional groups, and public officials. The committee emphasized the study will be completely objective and designed to provide an undistorted picture of actual law enforcement conditions and problems, revealing the strengths as well as the weaknesses of existing criminal procedures. Facts developed in the study ultimately will be made available to legislative bodies, law enforcement officials, bar and judicial organizations, and the public.

General Donovan observed that law enforcement "has been described so often in terms of its defects that few realize that great strides have been made in the professional competence of law enforcement officers; our object will be to lead the way toward improvement of the system, preserving its traditional values as a guardian of the rights of every individual."

Besides General Donovan, members of the Special Committee to direct the study are Albert J. Harno, Urbana, Illinois, Dean of the University of Illinois College of Law. Walter P. Armstrong, Jr., of Memphis, Tennessee, Chairman of the Criminal Law Section of the American Bar Association. Judge Bolitha J. Laws, Chief Judge of the United States District Court for the District of Columbia. Warren Olney III, Assistant Attorney General in charge of the Criminal Division of the Department of Justice. Floyd E. Thompson, of Chicago, former Chief Justice of the Illinois Supreme Court. G. Aaron Youngquist, of Minneapolis, Minnesota, former Assistant Attorney General of the United States.

Also attending the Committee's January session was Arthur H. Sherry, executive director of the survey, who is professor of law and criminology at the University of California.

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1955 Annual Meeting and ending at the adjournment of the 1958 Annual Meeting:

Arkansas	Nevada
Colorado	New Hampshire
Delaware	New York
Georgia	Ohio
Idaho	Oregon
Indiana	Rhode Island
Louisiana	Utah
Maryland	West Virginia
Minnesota	

Elections will be held in the States of Kansas and Virginia to fill the vacancies for the term expiring at the adjournment of the 1956 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1955 must be filed with the Board of Elections not later than March 25, 1955. Petitions received too late for publication in the March issue of the JOURNAL (deadline for receipt, January 28) cannot be published prior to distribution of ballots, which will take place on or about April 1, 1955.

Forms of nominating petitions may be obtained from Headquarters of the American Bar Association, 1155 East Sixtieth Street, Chicago 37, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M. March 25, 1955.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

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General Subscription price for nonmembers, $5 a year.
Students in Law Schools, $3 a year.
Price for a single copy, 75 cents; to members, 50 cents.
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EDITORIAL OFFICES

1155 East Sixtieth Street.....Chicago 37, Ill.

Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

■ *Avoidable Dilatoriness*

In a recent opinion as a Circuit Justice, Mr. Justice Frankfurter emphasized the desirability of discouraging needless delays on appeal. The case is *Albanese* v. *United States of America*, 75 S. Ct. 211; the proceeding an application for admission to bail. It had been denied by the trial court and the Court of Appeals. The discussion by the Circuit Justice is important and illuminating. We quote the opinion in full. It deals with a subject of importance to those engaged in the practice of criminal law.

> This is a petition for admission to bail pending appeal to the United States Court of Appeals for the Second Circuit from a sentence of imprisonment for five years and a fine of $5,000 for attempt and conspiracy to evade income taxes. Petitioner was so sentenced on October 5, 1954, and on the same day he noted an appeal. Since both the trial court and the Court of Appeals denied petitioner's motions for bail pending disposition of the appeal, he has begun serving his sentence. In his application petitioner sets forth at length the grounds on which he urges that the denial of bail by the two lower courts be set aside by me. The Government has countered with a memorandum in opposition, likewise on the merits, and to it petitioner has filed an extended reply. I would not be helped by oral repetition of the respective contentions.
>
> I cannot say that the questions which petitioner proposes to raise on appeal are frivolous. But even though his grounds of appeal be not frivolous, it is not for me to overrule the discretion exercised by the Court of Appeals in denying bail unless the record reveals a clear abuse of discretion by that court. There is no basis for so finding.
>
> Of course every safeguard of the law is to be scrupulously observed before sending people to prison. But it is also true that one of the blemishes of our administration of criminal justice is avoidable dilatoriness in disposing of a criminal charge either through acquittal or reversal of an erroneous conviction, or, on the other hand, in bringing a criminal to book. Needless delays on appeal are to be discouraged. Enlargement on bail after conviction where an appellate court does not find solid reasons for foreseeing reversal, is a fruitful source of dilatoriness in disposition of appeals.
>
> I see no reason why a half a year or so should elapse before disposition in the Court of Appeals of an appeal like that of the petitioner. I fail to appreciate why counsel fresh from the trial and fully conversant with the contested issues should not be ready to argue the appeal on the stenographic minutes of the trial without more, as promptly as the Court of Appeals can hear the case.
>
> Accordingly, I deny the application for bail subject to the following condition: if the petitioner is prepared to argue the appeal on the stenographic minutes of the trial before the end of this month, assuming that the Court of Appeals can, as I hope it can, arrange to hear the case and the Government does not join in such early hearing of the case, I shall entertain a renewal of this application if the Court of Appeals, under the changed circumstances indicated in this paragraph, adheres to its denial of bail.

■ *Progress*

Critics of the law are wont to declare that it is dormant and rarely displays evidence of progression. If those critics will look at the review of cases contained in What's New in the Law, as it appears in the February issue of the JOURNAL, they will be forced to admit that the law, like human progress, marches on.

Let us take an example. At common law, husband and wife were one. So, what could be more natural than for a husband, indicted for a crime which the state charged he committed in conspiracy with his wife, to argue that since no one can conspire with himself, the charge of conspiracy must be rejected. But that individual, as is indicated in What's New in the Law, has discovered that the law is not moribund. The court, in his case, took note of a series of its decisions which showed that the law has progressed to the point where the wife is virtually the equal of her husband, and, hence, "a husband and wife who enter into a criminal conspiracy are not immunized from prosecution by surviving radiations from the common-law fiction of unity of husband and wife".

In the decision of still another court, which is also reviewed in What's New in the Law, another phase of the law's advance is reflected. A wife, it develops, may maintain a tort action against her husband for an intentional assault.

The above illustrations of the law's progression were selected at random. The law keeps pace with man's progress. Its role in the state is not that of a leader, but when the leaders of men have gained ground for a cause, the law steps in and holds the ground.

Man's progress in many of life's aspects is reflected in the development of the law. For example, the enactment of the first and second Statutes of Westminster in 1275 and 1285, under the enlightened leadership of Edward I, spurred on the development of the emerging English common law. The writing of a lawbook, such as Hugo Grotius' *The Law of Nature and of Nations,* may play as important a part in the affairs of nations as the winning of a decisive battle. A decision such as *Marbury* v. *Madison* may assume a place in the framework of a nation secondary only to its constitution.

Development and growth are innate in the law. But it has no instinct for progress separate and apart from man's own growth. Those who are impatient with the law's development should look to themselves. When man makes further development, the law will keep pace.

■ *Our Courthouses*

A few days ago an attorney, upon leaving a courtroom which is housed upon the second floor of the local police station, encountered the officers who constitute for his city its first night relief. They were lined up before their captain in the corridor of the building preparatory to going out to their beats. The City's Finest, clothed in blue uniforms and each equipped with nightstick and trusty gun, were an impressive sight. The attorney paused for a moment, for those officers typified for his city law and order.

Hardly had the attorney departed from the police headquarters when a troop of Salvation Army faithfuls, headed by a little band, marched by on their way to skid row. The strains which poured forth from their instruments were not in perfect harmony, and the uniforms of those devoted souls were ill-fitting. But no one could help feel the strong moral appeal which their presence exerted, and no one could deny the sweetness of the message which filled the air as they played their Gospel hymns. "As an influence for law and order", our attorney friend said to himself, "that little group of Salvation Army adherents wields a more potent influence than the City's Finest." Yes, indeed, devotion to a good cause can exert a mighty influence. One engaged in good work need not utter a word concerning his cause. The work in which he is engaged speaks for him, and it does so with an eloquence that no tongue can rival. A Gideon Bible resting upon the dresser of a hotel room yields a greater respect for the moral law than the morals squad of any metropolitan police force.

As those thoughts were running through the mind of our friend, he came upon the local courthouse, erected a generation ago. There it stood, built of red bricks and encrusted with tawdry adornments, but representing nothing except the bad design of a bygone generation. The structure had no dome, and yet a dome is capable of lending majesty to an edifice. It was not even topped with the figure of the blind goddess holding aloft her scales of justice.

A courthouse which truly typifies the quality of justice, like a Gideon Bible or a Salvation Army band, can exert a wholesome influence. The message which its walls, its dome and its pillars, breathe forth, day by day, influences the growing child and shapes the thoughts of those who may become jurors. Such a structure, when well designed, denotes something more than law and order. It betokens justice, man's greatest quest here on earth.

A church is invariably shaped so as to proclaim its purpose as a house of worship. A banking structure strives to give forth impressions of strength and stability. An armory never fails to assume a martial appearance.

As members of a learned profession, we owe a duty to our community to see to it that when a new courthouse is built it will not be merely a portrayal of modern architecture nor an example of an architect's taste, however excellent that may be. Above all else, the edifice should symbolize justice and proclaim to all who see it that justice is the end of all government.

■ *"Variety's the Very Spice of Life"*

In February, 1949, a new cover appeared on the JOURNAL. It followed several months of experiment.

We are constantly seeking to make the JOURNAL more useful and interesting in style as well as substance.

It is desirable that our covers give distinction and character to the magazine and serve to make it easily identifiable. This persuades us that it should not be too often changed. But a period of six years with one type of cover would seem to justify something new.

So we are experimenting with a new one. The color and the figure will change each month. We hope you may like it, but we want you to tell us whether you do or not. We can always return to the old one for we certainly do not wish to impose upon our readers a cover which is not pleasing to them. Nor do we wish to continue an experiment once we are satisfied that it is not looked upon with favor.

Recently there has been a distressing number of JOURNALS delivered with badly damaged covers. We are trying to correct this by the use of heavier cover stock beginning with the April issue. At the same time we thought perhaps a change in the character of the cover might be interesting in view of the fact that the style heretofore used has served us for six years.

Accordingly, we eagerly solicit your views.

Preventing Design Piracy:

A Copyright Law for Industrial Designs

by Stewart L. Whitman · *of the New York Bar (New York City)*

■ **In 1954, the Supreme Court decided that an article may be useful as well as a work of art. This holding in Mazer v. Stein extends the scope of the copyright laws so that it is feasible to consider a statute to protect industrial designs from piracy—a protection not afforded by our present laws. Mr. Whitman advocates the enactment of such a statute and outlines the general provisions that it should contain.**

■ On March 8, 1954, the United States Supreme Court put an end to doubts and disputes over the validity of copyrights in an important branch of the arts, the field of industrial design. Works of art plainly intended to be reproduced as articles having utilitarian use, articles such as bookends, clocks, door knockers, candlesticks, ash trays, lamps and countless others, have been accepted for registration by the Copyright Office under a practice of long standing, but it has been hazardous, until now, to rely on such a copyright with any degree of confidence. Now we know, because the Supreme Court has so declared, that the scope of the Copyright Statute extends beyond the traditional fine arts and that under copyright law the utility of an article does not render its design any less a work of art.

The case in which the United States Supreme Court handed down this decision is *Mazer* v. *Stein*.[1] Its subject was a lamp or, to state it more accurately, it was a design intended for a lamp and so used. The base of the lamp was formed by a statuette made of china, admittedly copyrightable when it was a statuette and nothing more. The controversy arose out of the fact that this statuette was sold, equipped for use as a lamp, with electric wire, socket and lamp shade attached. The publication as a basis for copyright occurred in this form.

The manufacturers of these lamps conducted a campaign in the courts on behalf of their copyright. The case which the Supreme Court decided was one of five copyright infringement suits brought in five different federal circuits. In each case, the basic question was the same. Does reproduction of a design as an article of merchandise serving a utilitarian purpose, invalidate the copyright in the design as a work of art? The Seventh Circuit said "Yes", it did invalidate.[2] Also, the Eastern District Court of Michigan in the Sixth Circuit.[3] But the Fourth[4] and Ninth[5] Circuits said "No". There was a suit within the Second Circuit, too, brought in the Eastern District Court of New York, but that was never tried.

In this way, a legal controversy of long standing was crystalized in conflicting opinions and the Supreme Court was persuaded to settle the question. The case which came before the Supreme Court was one of those in which the copyright had been upheld. It was the decision of the Court of Appeals for the Fourth Circuit which held: "A subsequent utilization of a work of art in an article of manufacture in no way affects the right of the copyright owner to be protected against infringement of the work of art itself." The Supreme Court affirmed this decision. It found in the Copyright Statute[6] nothing to support an argument that the intended use or actual use in industry of an article otherwise eligible for copyright, bars or invalidates the copyright registration. The Court said:

> We do not read such a limitation into the copyright law.

The Court also settled another troublesome question by holding that copyright is not barred by the fact that the design might be patentable. The opinion by Justice Reed in the lamp case contributes a definitive

1. *Mazer* v. *Stein*, 347 U.S. 201 100 U.S.P.Q. 325.
2. *Stein* v. *Expert Lamp Co.*, 188 F. 2d 611.
3. *Stein* v. *Benaderet*, 109 F. Supp. 364.
4. *Stein* v. *Mazer*, 204 F. 2d 472.
5. *Rosenthal* v. *Stein*, 205 F. 2d 633.
6. 17 U.S.C.

summary of the distinction between a copyright and a design patent. The decision in *Mazer* v. *Stein*, therefore, permits an industrial designer to decide which, the copyright law or the patent law, is best adapted to his needs and circumstances and will give him the best protection.

Industrial Designs . . . *A Basis for Protection*

This case then is important to the Patent Bar and to everyone concerned with the protection of rights in intangibles and with intellectual property; not only because of the protection which it assures under our present copyright law but also because it gives the signal for action to secure for industrial designs more effectual and more practical copyright protection. The need for a statute for this purpose has long been recognized. The practical basis for such legislation is generally acknowledged. Now that the Supreme Court has supplied a solid legal basis, the discussions which began prior to 1929 can culminate in a copyright law tailored to industrial designs.

It was in 1929 that a new museum was founded in New York dedicated to modern art, with a young director whose plan included a department devoted to industrial art; as he put it, "from fountain pens to automobiles". Such an active and serious concern with the practical, commercial and popular arts, as well as with the so-called "fine" arts was a radical step for an American art museum, and it took two or three years to overcome the hesitance of the founders. The importance and influence of the Museum of Modern Art's exhibitions and of its Good Design Department now are generally acknowledged. By 1953, its collection included 670 pieces of furniture, utensils and other examples of modern design.

In 1929, also, a prominent manufacturer of silk fabrics failed in an effort to persuade a court to grant protection for a design. One of the most distinguished judges of our time, Judge Learned Hand, who wrote the decision, said: "True, it would seem as though the plaintiff had suffered a grievance for which there should be a remedy, perhaps by amendment of the Copyright Law. . . . "[7] Judge Hand suggested that Congress might perhaps see its way to create some sort of temporary right, and thus provide the remedy. This advice has been reiterated in recent decisions.[8]

It was only by coincidence that the founding of the Museum of Modern Art and the decision in *Cheney* v. *Doris* happened in the same year, but it seems more than a mere coincidence that in the past quarter century there has been such a notable development of active interest, both in the recognition of industrial design as an art form and in the effort to secure more adequate legal protection for this form of art. It is part of our social history as a nation. Wider popular appreciation of the form and appearance of the things which we use has given to the industrial designer's work greater commerical value, and, in turn, has increased his need for protection. Appreciation and recognition come first; protection lags behind.

Both recognition and protection were notably advanced by the Supreme Court's decision in the Lamp case, but *Mazer* v. *Stein* has not solved the problems to which Judge Hand referred when he told the Cheneys to go to Congress for help. The need for legislative action continues.

The purpose of such legislation would be to promote progress of industrial designing as a useful art by securing for a limited time to the creator of industrial designs the exclusive right to their respective works. Congress has the power to legislate for this purpose. Article 1, Section 8, Clause 8 of the Constitution refers specifically to the "useful Arts". True, in empowering Congress to grant exclusive rights for limited times, the Constitution names "authors" and their "writings" and it becomes necessary to construe this language as including the creations of the industrial designer, which the Supreme Court has now done, in effect. The concluding paragraph of the decision which now supplies this construction, says:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

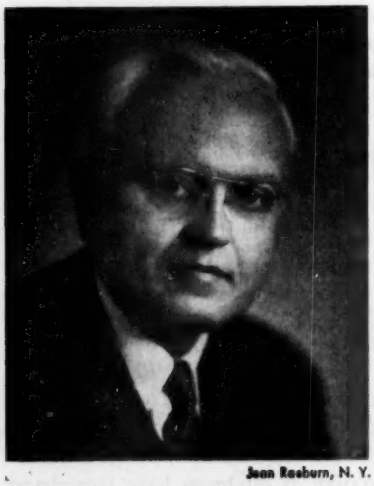
But the Court did not decide the constitutional issue. Two members of the Court, Justices Douglas and Black, believed that, on its own initiative, it ought to have considered and decided whether a statue, designed for use as a lamp base, comes within the constitutional range of the meaning of "writings" in the field of art.

There is cause for regretting that the Court did not undertake to settle this question. Probably its decision would have been favorable to the constitutionality of a copyright statute such as we are considering.

Baker v. Selden . . . *What Can Be Copyrighted?*

Seventy-five years ago, the Supreme Court in *Baker* v. *Selden* (101 U.S. 99) explained how ideas which are not copyrightable are distinguished from their expression, which may be the subject of copyright. The case involved a book on the subject of bookkeeping. A bookkeeping system was the idea and the plaintiff's explanation of the system, in his book, was the expression of the idea. "There is no doubt", said the Court, "that a work on the subject of bookkeeping . . . may be the subject of copyright." But this copyright was held not to extend to ruled lines which explained and illustrated the bookkeeping system. These ruled lines were a part of the system. In the practice of the system, they would be used and reproduced. This distinguished them from other pure-

7. *Cheney* v. *Doris*, 35 F. 2d 279
8. *Nat Lewis Purses* v. *Carole Bags*, 83 F. 2d 475, 476 (1936); *White* v. *Leanore Frocks*, 120 F. 2d 113, 115 (1941); *Bell* v. *Catalda*, 191 F. 2d 99, 104 (1951).



Jean Roeburn, N. Y.

Stewart L. Whitman was admitted to the New York Bar in 1929 after receiving his LL.B. from New York Law School. He served as counsel to the Alien Property Custodian in Washington during the war, and was in charge of the Trade-Mark and Copyright Sections of the Custodian's office. He has practiced in New York City since 1929.

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ly explanatory matter, and it made them ineligible to copyright.

The Court said that "the same distinction may be predicated of every other art as well as that of bookkeeping", and it gave examples, showing how this would apply to books on various subjects, but observing that it would not apply to "ornamental designs or pictorial illustrations addressed to the taste". As to these, said the Court, it might be said "that their form is their essence, and their object the production of pleasure in their contemplation". This, rather than utility, is their function and purpose.

The promotion of this objective by appropriate protective measures seems plainly within the power of Congress, and copyright affords appropriate means and measures of protection for all those elements of industrial designs which, as the Supreme Court said, are "addressed to the taste" and have form as their essence.

But the existing copyright statute is too generous for such purpose. It is true that the courts in deciding copyright cases do not act as art critics or pretend to establish standards of beauty and, under the decision in the Lamp case, a design might be copyrighted and fully protected though not eligible for the Museum of Modern Art. But twenty-eight years, with a possible renewal for a like term, which is the period of protection provided by the present copyright law, is more suitable for works of art created in the hope that they will be ageless, than for the relatively ephemeral arts whose needs we are discussing. The average industrial design does not require prolonged protection. In the *Cheney* case, the request was for only eight or nine months, that being the season for a silk design. A statute giving twenty-eight years with an equally long renewal is not helpful because it offers too much, and, quite naturally, a court would be reluctant to enforce exclusive rights for such a term unless that which is to be granted the protection has proportionate merit. A long term of protection quite properly calls for a standard of artistic merit far above the average.

What is needed, therefore, is a statute similar in principle and purpose to the present copyright statute but tailored to fit the more modest requirements of the average industrial design. These requirements vary, of course. The season for a woman's dress or hat will be shorter than the season for a set of china or silverware. It is not possible, or, at least, not practical, however, to draft a law which will exactly fit all these needs. The consensus thus far, seems to be that a five-year term of protection, with the right to one renewal, would be sufficient for most industrial designs. Those requiring and meriting a longer term in all probability would be such as can find protection under the present copyright statute, or under the design patent law.

What are these industrial designs which need a new law? They are the designs for which protection has been sought in the courts under one law or another in a long succession of cases during the past quarter century. They are the designs for textiles, for millinery, for men's ties, for jewelry, for china, for purses, for dresses and even for household gadgets. Any article which can be manufactured and which has utility can be given some aesthetic appeal. Therefore there is no limit to the subjects for such designs. All that is necessary is that the primary purpose of the design shall be ornamental and not utilitarian. The value of the design shall lie in its making the article more attractive to the eye and giving it a distinctive appearance.

As already remarked, the law which is contemplated is similar in principle and purpose to the present copyright statute. The main requirement for a copyright is originality. Originality means that the designer actually created something, and in creating it relied on his own efforts and on such talents as he may possess. Such a law would not be concerned with whether the originally created design is unique or novel, or the degree of its beauty, for, as the Supreme Court said in the Lamp case: "Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art." As a contribution to the field of industrial design it may be trifling. If it does not contribute in any way, it will not attract buyers and will fail commercially, and, if it is not novel in any sense, then probably there will be so many others like it that there will be no basis for preferring it and again it will fail commercially. Indeed, there may exist others quite like it because, if another designer working independently produces the same thing, he, too, is the creator of an original design for which he should be granted a copyright.

For the most part, such designs will have no such originality as would be required to support a design patent, since a design patent is granted in recognition of inventive genius and a high degree of originality and only where something completely new has been created.

This means that before a design patent can be issued there must be a search by the Patent Office to make sure that it actually is a novel and highly original creation, and such a search takes time. To do this, it often takes more than the life span of the average fashion which our industrial designer tries to serve. Therefore, the principles and methods of copyright seem better suited for our purposes.

In accordance with these principles and methods, having created his design, the designer makes it public with a notice that he claims it to be his design, and, thereafter, promptly registers this claim with the authority created in Washington for this purpose. What this notice means is, quite simply, that for the term of the copyright, that is, for five years from the published date, no one shall have the right to make a copy of this design for commercial purposes. In other words, the law which is now being considered, would make the copying of such a design during the term of the copyright illegal and properly characterized as piracy.

Design Piracy . . . *Copying Is Legal*

Design piracy is an expression which has been used very freely and with much heat for many years. From the point of view of creators of fashion and of the people who have worked to make merchandise more pleasing to our eyes, the copyist has always been a pirate, and yet the courts, rightly, have reminded us, again and again, that apart from unfair competition, even the most slavish copy of an uncopyrighted or unpatented design is a wholly legal act.

A decision was handed down by the New York Southern District Court in a case involving a design tor a clock. The original design had been made and used for a unique and expensive timepiece which required no winding and no electricity. A relatively cheap electric clock was brought out in exactly the same design. The Court said that the maker of the electric clock "undoubtedly intended to and did avail itself of an eye-catching design and hoped to cater to the price-conscious purchaser who desires to own a copy of a luxuriously designed clock regardless of mechanism or source. But such an imitation alone is not unfair competition in the legal sense."[9]

Because copyright law is concerned with originality rather than with novelty, the registration of copyrights, after publication with notice, has never been regarded as an important element of the law. Most copyrights for books probably do get registered, but, probably, not the majority of the copyrights taken out for comic strips, advertisements and other more ephemeral writings. Many never will be registered.

An author knows whether or not he is doing original work and the publisher usually protects himself with the author's warranty. The proposed design copyright law also would be concerned with originality, not novelty, so that a designer need not spend his money, time and effort in searching the register or hold up production pending a search. As compared with patents, therefore, the occasions for searching the copyright registration records are relatively few. Nevertheless, it would seem desirable to make registration, within a reasonably short period after publication, one of the requirements for a valid design copyright, and it has been proposed that the claimant of a design copyright should be required to register within, say six months, or else forfeit his copyright. There is likely to be a practical need, in the case of design copyright, for such a register, and search, of course, is futile unless all claims are registered.

Obviously, it is not possible to draft a law which will avoid all hazards of innocent infringement. A design copyright law could, and probably should, provide, however, that a dealer who innocently acquires infringing merchandise shall not be held liable and shall be permitted to dispose of whatever he purchased. But to permit a manufacturer to enjoy the same privilege and continue to use an infringing design in the manufacture of his goods, would be destructive of the purposes of design copyright. Sometimes an innocent infringer will get hurt, but the protection of design copyright will, it is believed, outweigh the hazards.

The design pirate, who, the law now says, is not a pirate at all but is a lawful copyist, is completely beyond his victim's control. The risk of innocent infringement, on the other hand, can be guarded against. To a large degree, the manufacturer will have to place reliance on his designers, but there should be available to him means of checking on the designs submitted to him, including the searching of the official register, when such a precaution seems warranted. Such a register would also be of service to persons considering protection for their designs under the patent laws.

Registration of design copyrights, therefore, is important, but more important still is the copyright notice. The copyright notice is the heart of any copyright law. A copyright is created by publication with notice and, except as excused by law, is forever lost by publication without a notice. The contemplated design copyright would operate on much the same principle. The notice, obviously, would have to be distinguishable from the familiar copyright notice. This would be a design copyright, and where the "C" in a circle serves for an ordinary copyright, a "D" in a circle could serve here. The existing copyright law requires, in most instances, that the notice include the year of publication. The proposed design copyright being for a brief term, it seems fair to include the month as well as the year for the public's convenience.

The need for tailoring existing copyright law to fit the requirements of industrial design, is again apparent in considering how to affix the notice. Thus, for example, when manufacturers of textiles have sought protection under the existing copy-

9. *Mastercrafters Clock Company v. Vacheron Watches*, 100 U.S.P.Q. 432, 436 (S.D.N.Y. March 11, 1954, McGohey, J.)

right law, they have been confronted with the necessity of repeating a copyright notice with each repetitive use of the design. This is never practical, and in some instances can become an absurdity. A design copyright law might very well provide that repetition of the notice on the selvage or margin at intervals of perhaps five yards, would meet the requirements. Again, when fabric has no selvage, a notice on the back of the fabric might suffice. In short, here there would be an opportunity to make practical adjustments and bring the copyright law up to date without disturbing the existing copyright statute.

More difficult questions arise, however, when considering the effectiveness of the notice: Assume that a design is copyrightable and that it was properly brought out with the required notice. The law has been complied with in every respect. Then a copy of the design appears on the market. Will the owner of the design copyright have a prompt and reasonable remedy? What must he prove in order to get prompt relief?

Was There Copying? . . . *The Difficulty of Proof*

As pointed out, under copyright law, the wrong is to copy. Therefore, it would appear that what must be proved is that the copyrighted design was copied. Does this mean that it becomes necessary to produce evidence that the maker of the duplicate used the original copyrighted article as a model? Obviously, this sort of evidence can be secured only under unusual circumstances. Even under present conditions, where the copyright of industrial designs is a lawful pursuit, it is not easy to get anyone to admit that he has copied. If copying industrial designs actually becomes industrial piracy, admissions will hardly be obtainable.

If the law under discussion is to be at all effective, there will have to be acceptable evidence to establish copying other than actual proof that one design was traced from the other. In other words, how far should copying be presumed? Before saying more about this, it would be well to point out the importance of protecting the industrial designer not only from having his design copied, but also from fraudulent or mistaken and misguided claims that his is a copy. Simultaneous creation is a fact more readily accepted intellectually than emotionally. It has been explained again and again, and yet, when someone has created a thing of merit, whether it is scientific or in the arts, it is difficult to persuade him that another could have produced almost identically the same thing without having copied what he created. Such incredulity has resulted in much unfortunate copyright litigation. And then, of course, there is, and always will be, the strike suit by one who knowingly and fraudulently claims that his copyrighted creation was stolen from him. To stop the bringing of strike suits, or of suits by misguided persons who honestly, but mistakenly, believe that their creations were copied, heavy costs have been assessed against the losers in copyright cases which should never have been brought.

This problem will be no easier in connection with the proposed design copyright law. In fact, it may be still more difficult. If a story or a poem or even a piece of advertising literature is word for word identical with an earlier copyrighted publication, or, even though not word for word, the language is closely similar, it may reasonably be presumed, and where access was possible, often is presumed, that it was copied. There are limits to the chance of things being said in the identical way, with the same combination of words. This also applies to the more elaborate designs but not to those simpler ones, the protection of which is of great concern. Particularly in this day, simplicity of line and simplicity in decoration are valued. The designer will not benefit from a law which will make him fearful that what he believes he is creating is really something that he saw already displayed or advertised—something beautiful or suitable, but readily absorbed and unconsciously duplicated. A law which would presume that what is similar was copied would have a paralyzing effect, not only on the designer himself, but on the manufacturer who would have no way of knowing whether his designer's creation will bring him commercial success, or, instead, expensive litigation.

Therefore, the problem of design piracy would not be solved by a law under which the owner of a copyrighted design could come into court and get an injunction only by showing that his protected merchandise was on display in stores or was reproduced in advertising where the defendant could have seen it. Such a presumption would put on the industrial designer the burden of proving himself innocent of the wrong of copying, and, therefore, would be contrary to our basic and most treasured principle that every man is innocent until proved guilty.

What will be needed is a rule of evidence that will not require the impossible proof of actual physical copying and will yet make it necessary for the plaintiff in such a case to assume a reasonable burden of proof. Also, what is required is a reasonable preponderance of evidence. For example, it might be shown that defendant had actually purchased the plaintiff's article or that he had used the same manufacturer to produce the copy. In short, there must be more evidence than merely the fact that the defendant is selling something which duplicates an article already on the market with a copyright notice.

Such requirements of evidence may make relief from piracy not as easy as some enthusiasts might like it to be, but it will be in keeping with legal concepts and principles, and in the end, it will give better protection to all concerned.

No one who is seriously concerned with the problem of industrial design piracy wants an unenforceable statute. No one wants to waste time on an idle legislative gesture. The statute which is contemplated should be enforceable and in clear cases of

piracy, enforcement could be swift. But its greatest effectiveness and its main strength would come not from litigation, but from common consent. By recognizing and defining industrial design piracy, such a statute would separate the sheep from the goats among the industrial designers.

Industrial designers and the manufacturers who use the designs ask and are entitled to rewards commensurate with the services they render. They, in turn, may be counted on to respect the equal rights of their colleagues and competitors.

The Uniform Divorce Bill:

A Proposed Solution for Our Divorce Muddle

■ Whatever differences of opinion may exist on the problem of divorce, there seems to be general agreement that the existing situation is thoroughly muddled. One of the organizations that has spent considerable time in studying the problem is the National Association of Women Lawyers. After careful and critical study of the many legislative solutions proposed, they have drafted a proposed Uniform Divorce Bill, which is described in the following article sent to us by Matilda Fenberg, of the Chicago Bar.

■ For many years, the Committee on Uniform Marriage and Divorce of the National Association of Women Lawyers has studied the various proposed legislative solutions to the problem of the muddled divorce laws in our states.

They examined carefully the proposed solution advocated by the late Senator Arthur Capper of Kansas. He introduced in the Senate an amendment to the Constitution of the United States which would give Congress the power to enact legislation governing marriage and divorce throughout the land.

They studied critically the proposed solution of the late Senator McCarran, of Nevada, who advocated the panacea of the full faith and credit clause. As long ago as 1790, Congress enacted under the full faith and credit clause of the Constitution a statute regarding state court judgments, but not specifically mentioning divorces. Its power to proceed under this clause has never been questioned and so the Senator introduced a bill in the Senate which would entitle a divorce decree of any state to full faith and credit in every other state providing that (1) the decree is final, (2) the decree is valid in the state where rendered, (3) the decree contains recitals setting forth that the jurisdictional prerequisites have been met, and (4) the state in which the decree was granted was the last state in which the couple lived together as husband and wife, or the defendant was personally subject to the state's jurisdiction or appeared generally in the proceedings.

The Senator claimed that Congress is partly to blame for the present divorce muddle through its failure for more than a century and a half, to exercise its responsibilities under the full faith and credit clause of the Constitution.

William G. Ruymann, of the Nevada Bar, points out in his able and critical diagnosis of the various legal solutions for the divorce muddle ("The Problem of Migratory Divorce", AMERICAN BAR ASSOCIATION JOURNAL, January, 1951) that most of the confusing state of divorce law in this country is due to the full faith and credit clause of the Constitution as well as the jealousy among states and the theory that divorce is purely a local matter. The decisions of the Supreme Court which he hopes will solve the question of migratory divorces have done nothing so far but add to the existing confusion. He states, however, that a Uniform Divorce Law is a possible solution and in this conclusion he agrees with the Committee on Uniform Marriage and Divorce of the National Association of Women Lawyers. They felt that a clear, simple model of a uniform divorce bill had never been drafted and presented to the states for adoption and so this proposed solution had never been given a fair trial. They fully realized that no law, however wise, can correct the causes of marital disharmony for these are deeply rooted in the nature of human beings and in the mores of our society and in our economic and social life. The purpose of legislation should be to preserve the marriage relationship if possible and to afford relief by divorce only if the welfare of the parties, their children, if any, and the community requires such action.

From data presented by E. Dana Brooks, the Director of the Depart-

ment of Domestic Relations of Cleveland, Ohio, for proposed standards of marriage and divorce, this committee under its present chairman, Matilda Fenberg, of the Chicago Bar Association, has drafted a Model Divorce Bill or a proposed Uniform Divorce Bill, which sets forth simply and clearly the basic minimum requirements for a good family relationship and gives the courts the right to terminate the status upon showing that this particular family failed to meet those minimum requirements. In other words the divorce law is based on problems relating to the treatment of causes rather than symptoms.

The original draft was presented to the Matrimonial Law Committee of the Chicago Bar Association, of which Miss Fenberg is a member. At her suggestion a subcommittee, including her, was appointed. This committee met every week for almost two years until they finally completed a revision of the original draft so that the present proposed Uniform Divorce Bill which the National Association of Women Lawyers is now sponsoring is, in the opinion of Judge Paul W. Alexander, of Toledo, Ohio, "the best draft that has been produced so far and might well be the one eventually accepted by every state". He has recommended its introduction to the legislatures of several states already.

The Bill has been praised by Professor Harper and the Dean of Yale Law School as well as by the deans and professors and instructors of domestic relations law in the leading universities in the United States as the most progressive legislation on a vital subject that has ever been undertaken. Most organizations who have attempted to draft such a bill have lost interest before they started because the subject was too controversial for them to reach any conclusion.

The Bill states the necessity for a revaluation of our legal concepts concerning divorce in the light of the social, economic, spiritual and legal problems in its introduction. No attempt was made to provide for the annulment of marriage as this subject does not properly come within the scope of the statute on divorce.

In existing divorce laws the husband and wife are opponents; one must be found guilty and punished, the other innocent and given an award. If both are guilty, no award can be made to either, and the marriage must continue.

The Proposed Uniform Divorce Bill attempts to correct this situation by eliminating the contest features and substituting therefor a process of mediation and reconciliation and also by changing the title of the case from a complaint to a petition entitled—"In the Matter of the Family of John Doe".

The most outstanding feature of this Uniform Divorce Bill is the therapeutic approach which it adopts. Parties should be able to come to court, not for a fight, but for help.

Legal machinery should be available for the purpose of healing and curing. Every available resource for the encouragement of reconciliation should be used. There should be no public charges and counter charges. The judge should have the complete family record before him and his decision should be made with the family welfare in mind. If he allows a marriage to be dissolved, it should be not because one party or the other is guilty, but because the marriage has become unbearable to the parties, unfair to the children, if any, and of no value to the state.

This proposed law is based on problems relating to the treatment of causes rather than symptoms. The grounds for divorce are included in only five general classifications or categories, but they embrace the usual grounds found in most of the states, such as adultery, cruelty, legally adjudicated mental illness which has continued for three years, impotence which has existed from the time of the marriage, and when there has been for a period of one year or more, a wilful desertion, habitual drunkenness or imprisonment in a penal institution. They are, however, restated as a violation of mutual fidelity, mutual respect, mutual right of consortium and mental or sexual incapacity. It was felt necessary and desirable to set up minimum grounds in order to avoid the vesting of absolute discretion in the court in this phase of divorce so as to prevent the possible abuse of this discretion.

The careful restatement of the best case and statutory law of the country is particularly observed in such matters as the custody and maintenance of children, alimony and property rights, costs, expenses, attorney's fees and references to a master in chancery or other officer. The same is true for a clear and concise definition of the injunctive and contempt powers of the court. An attempt was also made to solve the many contradictory rules and decisions of the courts in connection with the modification of decrees after divorce, because of changed circumstances such as economics, remarriage, or death of any of the parties by including safeguards for agreements made in good faith at the time of the hearing. Provision is made to give the same force and effect to decrees and orders of sister states as decrees of the instant state and remarriage is permitted immediately after the entry of a decree of divorce.

It is the opinion of the best legal talent available that this proposed Uniform Divorce Bill is in keeping with the spirit of the times and will better meet the needs of the states whose divorce laws have failed to keep pace with modern progress.

Professor Fowler V. Harper, of Yale Law School, New Haven, Connecticut, April 21, 1953, wrote: "I have gone over this Bill with considerable care and to my mind, it is by far the most intelligent approach to the subject which I have yet seen. I do not think this or any other bill can solve the divorce problem, but I do think that it affords as sensible a method for dealing with the legal aspects of divorce and the collateral problems which arise in connection with it as can be conceived.

Nominating Petitions

Idaho

■ The undersigned hereby nominate E. B. Smith, of Boise, for the office of State Delegate for and from the State of Idaho, to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

Clarence L. Hillman, Eugene Hughes Anderson, Willis C. Moffatt, Merlin S. Young, Harry S. Kessler, James H. Hawley, Frank F. Church, Charles R. Donaldson, J. W. Galloway, Z. Reed Millar, Samuel Kaufman, Jr., and William M. Smith, of Boise:

Louie Gorrono and E. W. Stewart, of Emmett;

Charles Scoggin, of Fairfield;

A. L. Merrill, R. D. Merrill, Wesley F. Merrill, L. H. Anderson, O. R. Baum, George W. Hargraves, L. E. Glennon, Ralph H. Jones, and Darwin D. Brown, of Pocatello;

Everett B. Taylor, of Sun Valley.

Indiana

■ The undersigned hereby nominate Telford B. Orbison, of New Albany, for the office of State Delegate for and from the State of Indiana, to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

Harold H. Bredell, John G. Rauch, Elbert R. Gilliom, C. Wendell Martin, Merle H. Miller, Adolph Schreiber, Harry T. Ice, Kenneth Foster, Theodore L. Locke, Robert D. Coleman, Thomas M. Scanlon, Raymond W. Gray, Jr., George J. Zazas, Alan C. Boyd, John W. Houghton, Frederic D. Anderson, Alan W. Boyd, Jerry P. Belknap, Lester M. Ponder, Lester Irons and Hubert Hickam, of Indianapolis;

Charles C. Fox, Robert J. Prentice, Dixon W. Prentice and Albert Meranda, of Jeffersonville.

Maryland

■ The undersigned hereby nominate R. Carleton Sharretts., Jr., of Baltimore, for the office of State Delegate for and from the State of Maryland to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

Charles B. Hoffman, Morton J. Hollander, Gerald W. Hill, Richard W. Emory, Howard H. Conaway, Walter V. Harrison, C. Keating Bowie, E. Paul Mason, Jr., Walter R. Tabler, Jr., Frank E. Horka, Claude L. Callegary, Thomas N. Biddison, James H. Cook, Rignal W. Baldwin, Charles P. Coady, Jr., Emma S. Robertson, Leon H. A. Pierson, Frederick Green, Jr., F. Edward Wheeler, Webster S. Blades, Walter E. Black, Jr., Paul C. Wolman, John H. Herold and Louis E. Carliner, of Baltimore;

A. Gordon Boone, of Towson.

Minnesota

■ The undersigned hereby nominate William W. Gibson, of Minneapolis, for the office of State Delegate for and from the State of Minnesota, to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

Benjamin J. Blacik, Francis C. Sullivan, George W. Atmore, William K. Montague, J. E. Montague, P. J. Lyons and Harry C. Applequist, of Duluth;

C. A. (Gus) Johnson, of Mankato;

Clarence O. Holten, Charles B. Howard, Leonard O. Langer and Carl O. Wegner, of Minneapolis;

Thomas P. Welch, of Buffalo;

S. P. Gislason, of New Ulm;

John B. Burke, M. J. Galvin, Agnes M. Anderson, Daniel Dennis O'Connell, Daniel John O'Connell, E. W. Murnane and Gustavus Loevinger, of St. Paul;

Reuben G. Thoreen, John F. Thoreen, and Roderick A. Lawson, of Stillwater;

Alvin R. Johanson, of Wheaton.

New York

■ The undersigned hereby nominate Lewis C. Ryan, of Syracuse, for the office of State Delegate for and from the State of New York to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

Chester Wood and Robert C. Poskanzer, of Albany;

Hunter L. Delatour and Jackson A. Dykman, of Brooklyn;

Franklin R. Brown, Ralph M. Andrews, Edward H. Letchworth, and William L. Marcy, of Buffalo;

Arthur A. Ballantine, Mason H. Bigelow, Harold J. Gallagher, Joseph M. Hartfield, Alfred Heuston, John G. Jackson, Cloyd Laporte, R. E. Lee, Orison S. Marden, Joseph M. Proskauer, Whitney North Seymour, Harrison Tweed, Weston Vernon and Bethuel M. Webster of New York;

Arthur VD. Chamberlain, of Rochester;

Edmund H. Lewis and William E. McClusky, of Syracuse.

Ohio

■ The undersigned hereby nominate Ben C. Boer, of Cleveland, for the office of State Delegate for and from the State of Ohio to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

Howard L. Barkdull, J. Hall Kellogg, J. Craig McClelland, Harry F. Pattie, H. Walter Stewart, Paul J. Bickel, H. O. Mierke, H. A. Hauxhurst, W. R. VanAken, Barring Coughlin, Paul L. Holden, Elmore L. Andrews, Raymond G. Hengst, Robert J. Bulkley, Carl F. Shuler, Robert J. Shoup, David A. Gaskill, Eugene H. Freedheim, William J. Kraus, Rees H. Davis, Dennis W. Palmquist, L. Beaumont Parks, James A. Gleason, Howard S. Bissell and Richard T. Brown, of Cleveland.

Ohio

■ The undersigned hereby nominate Philip C. Ebeling, of Dayton, for the office of State Delegate for and from the State of Ohio to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

Bert H. Long, Walter Schmitt, Grauman Marks and Charles E. Weber, of Cincinnati;

John S. Pyke, Roger P. Brennan, H. Walter Stewart, David A. Gaskill, Charles W. Sellers and John L. McChord, of Cleveland;

Robert M. Calfee, of Cleveland Heights;

Waymon B. McLeskey, James M. Hengst, Lloyd E. Bilger and Collis Gundy Lane, of Columbus;

Harry S. Winer and Eugene A. Mayl, of Dayton;

Harold J. Meredith, of Lima;

Samuel Freifield, of Steubenville;

Donald A. Finkbeiner and Wayne E. Stichter, of Toledo;

Robert G. Day and John Q. T. Ford, of Warren;

C. Kenneth Clark and Harry S. Manchester, of Youngstown.

Oregon

■ The undersigned hereby nominate Glenn R. Jack, of Oregon City, for the office of State Delegate for and from the State of Oregon, to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

A. S. Grant and Armand H. Fuchs, of Baker;

Randall B. Kester, of Beaverton;

Ralph R. Bailey, W. H. Morrison, Roy F. Shields, Walter J. Cosgrove, Robert F. Maguire, James G. Smith, Alfred A. Hampson, Jr., Howard K. Beebe, Nathan Cohen, Raymond L. Jones, Herbert H. Anderson, John P. Bledsoe, James H. Clarke, F. Joseph Larkin, James D. Tredup, Oglesby H. Young, Frank H. Spears, William F. Lubersky, Harry J. DeFrancq, George B. Campbell, John Gordon Gearin and Clarence J. Young, of Portland.

Utah

■ The undersigned hereby nominate Franklin Riter, of Salt Lake City, for the office of State Delegate for and from the State of Utah to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

Walter G. Mann and Lewis Jones, of Brigham City;

M. C. Harris, Charles P. Olson and Asa Bullen, of Logan;

Neil R. Olmstead, David L. Stine, Stuart P. Dobbs, Charles G. Cowley, David K. Holther, Ralph J. Lowe, Ira A. Huggins, Arthur Woolley, Samuel C. Powell and Lewis J. Wallace, of Ogden;

Calvin Behle, Albert R. Bowen, Grant C. Aadnesen, S. N. Cornwall, Grant H. Bagley, Dennis McCarthy, Joseph S. Jones, C. E. Henderson, Andrew R. Hurley and Edwin B. Cannon, of Salt Lake City.

West Virginia

■ The undersigned hereby nominate Frank C. Haymond, of Charleston, for the office of State Delegate for and from the State of West Virginia, to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

Charles C. Wise, Jr., Robert G. Kelly, Robert S. Spilman, Thomas B. Jackson, Homer A. Holt and James Lee Thompson, of Charleston;

W. G. Stathers, Arch M. Cantrall, Howard L. Robinson, James Clifford McManaway, Lawrence R. Lynch and Louis Johnson, of Clarksburg;

William P. Lehman, Tusca Morris and Harry E. Watkins, of Fairmont;

Okey P. Keadle, Jackson N. Huddleston, E. A. Marshall and Harry Scherr, of Huntington;

Robert B. McDougle, William Bruce Hoff and H. O. Hiteshew, of Parkersburg;

Wright Hugus, Henry S. Schrader and Carl O. Schmidt, of Wheeling.

President Eisenhower Appoints Marshall Anniversary Commission

■ The American Bar Association is well represented on the special commission appointed by President Eisenhower to direct the national observance of the 200th anniversary of the birth of John Marshall, fourth Chief Justice of the United States. President Loyd Wright and John D. Randall, Chairman of the House of Delegates, both were named to the commission. Other appointees included Chief Justice Earl Warren, former Governor Thomas E. Dewey, Chief Justice Arthur T. Vanderbilt, of New Jersey; Edgar N. Eisenhower, brother of the President; Dr. Alvin D. Chanler, President of the College of William and Mary, and Katharine Agar, Chicago, former President of the Women's Bar Association of Illinois.

Coincident with the appointment of the commission, the DuPont Company announced that its "Cavalcade of America" series would televise a special program on March 15 based on the role of John Marshall in *Marbury* v. *Madison*. The special program, "Decision for Justice", will be televised nationally over the ABC-TV network at 7:30 P.M. E.S.T. In many cities the broadcast will be delayed to later dates.

Books for Lawyers

THE STORY OF THE DECLARATION OF INDEPENDENCE *By Dumas Malone. New York: Oxford University Press. 1954. $10.00. Pages 282.*

An interesting and highly valuable source book, which should be in the library of every lawyer and of every newspaper and magazine, and indeed of every American citizen that possesses a library, is the handsomely bound and profusely illustrated volume, entitled *The Story of the Declaration of Independence,* recently (1954) published in New York by Oxford University Press.

The text is by Dumas Malone and the pictures by Hirst Milhollen and Milton Kaplan. There are 282 large pages, the paper is excellent, the type is large and readable, and the binding is durable and distinctive. The price is ten dollars and the book is well worth it. The hundreds of pictures are derived from various sources. Many, if not most, are familiar to students of our history but there are also many which have not been previously reproduced. In addition to a facsimile of the original draft in Jefferson's clear handwriting, there is also a facsimile of the Declaration engrossed on parchment in the script of Timothy Matlack, and bearing the signatures of the signers, as enshrined in the National Archives at Washington. For those who prefer greater legibility there is a type copy without the signatures. In addition, the volume contains much information about the incidents and causes that led to the Declaration and a biography of each of the signers.

Altogether, it makes fascinating reading, especially at this time when the disintegration of the British Empire has progressed so far. Subsequent to losing the thirteen colonies, Great Britain built up the Empire until at the beginning of the current century it included about one fourth of the land surface of the earth and a white population of over 53 millions and unnumbered "natives", besides at least a poetic claim to ruling the waves.

The glittering and resounding generalities of natural right, as Rufus Choate called them in 1856, though not intended by the signers to be taken literally, have incited "natives" all over the world to break away from colonial rule and invalidate the claim that the white man's burden was to govern "lesser breeds". In fact, these "self-evident" principles, which are not self-evident at all, if taken literally, have actuated the anti-segregation movement within this country. We are beginning to take the Declaration seriously, even though the signers did not.

The text of the Declaration makes stimulating reading for the American of today in the light of events and existing conditions. Many of its resounding phrases reflect in some degree the ideas of John Locke, the English philosopher. Some of those phrases, beginning with the assertion that all men are created equal, will hardly withstand criticism today unless qualified. Indeed, some of the complaints against George III could be repeated with current internal applications as reminders; such as "He has erected a multitude of new offices and sent hither swarms of officers to harass our people, and eat out their substance." But these tax-gatherers are at least our own. Nevertheless, if we may smile at some of the declamatory phrases, we cannot read the Declaration without realizing that it is a noble document, and the men who signed it, at the risk of life and fortune, were valiants who gave an example that has been followed on occasions.

One occasion was the Civil War when the chivalry of the South risked their lives and fortunes in a struggle which involved, among other principles, a denial of the tenet that all men are born equal.

EUSTACE CULLINAN
San Francisco, California

WORKMEN'S COMPENSATION. *By Herman Miles Somers and Anne Ramsay Somers. New York: John Wiley & Sons, Inc. 1954. $6.50. Pages xv, 341.*

These are days of growing interest in the problems of social insurance. The clamor of groups who would convert unemployment compensation into a guaranteed annual wage and workmen's compensation into health and hospitalization insurance have aroused the concern of many who heretofore have had little occasion to consider these fields of the law.

One aspect of this current demand for cradle to grave security—the role of workmen's compensation in the nation's social security structure—is thoughtfully explored by Mr. and Mrs. Somers. The book has special interest for those who desire an introductory survey of the field. They may be surprised to learn that about 1 per cent of employers' payrolls—about $1,300,000,000 annually—is required to support the present workmen's compensation program. About one half of this annual outlay goes to injured employees. The remainder is consumed by overhead costs, such as insurance, legal fees and administration.

The authors review what they deem to be the "conspicuous inadequacy" of the present program. Many of their comments may draw the fire of special interest groups: the insurance industry may challenge its description as "an alert beneficiary of the compulsory insurance provisions of the program"; compensation lawyers representing claimants may take exception to the suggestion that

lump sum settlements are undesirable, as being conducive to ambulance chasing, medical malpractices and malingering. But all concerned with the administration of workmen's compensation will be interested in what the authors have to say.

The opening chapters trace the development of the program. There follows a full treatment of the question of coverage and benefits, with particular attention being paid to excluded employments and injuries, and comparative levels (as well as the adequacy) of cash and medical benefits.

The next major topic has to do with the use of insurance as a method of financing the program. Consideration is given to rate-making, variations in the cost of insurance, what proportion of the premium dollar reaches the injured worker, and the controversy as to the comparative merits of different types of insurance.

Detailed consideration is also given the subject of administration and litigation. The authors find little to praise in the work of either the agencies or the courts. This, of course, is often true when social insurance consultants or labor economists view the operation of legal machinery. Some of their criticisms will provoke dissents from attorneys who read the book.

Passing to more general considerations, the book contains a thoughtful discussion concerning programs of safety and occupational health designed as preventive measures. Particular attention is paid to the problem of rehabilitation; provocative questions are raised whether certain aspects of the administration of the compensation programs operate unfortunately to interfere with the effective work of rehabilitation, which in theory is a key-stone of the whole structure.

Throughout the book, relationship of workmen's compensation to other social insurance is carefully developed.

FRANK E. COOPER
Detroit, Michigan

AMERICAN HERITAGE. *Volume VI, Number 4, December, 1954. American Heritage Publishing Company, distributed by Simon and Schuster, New York. $2.95. Pages 120.*

The following mythical inter-office memorandum reflects this reviewer's views:

From: Mr. Simon
To: Mr. Schuster

We have been asked to take over the distribution of *American Heriage,* the magazine of history which is now to be published in book form, that is, with hard covers.

The *American Heritage* has hitherto been published quarterly. It has been an extraordinarily handsome publication with fascinating contents but in the magazine class it has priced itself out of the mass market. While the magazine format has provided economies in production costs it has been inappropriate for a publication having permanent value. Since few purchasers would wish to discard their magazines, the closet shelf rather than the book shelf became the repository for old issues. Public acceptance of the venture was not as wide as it might have been because purchasers regarded it as a luxury magazine item. It was found in libraries, clubs and a selected subscriber list rather than in homes generally.

Placing it in hard covers and pricing it at the low level proposed will bring the publication into the moderate price book market. For subscribers to the series, it will be in the moderately low price book market. It will carry with it in its new market the prestige and luxury value it has built up for itself in the magazine category. It should, therefore, tap a wide market.

Moreover, it is a logical extension of the concept of this publication that its contents, which are permanent in character, should have a permanent form of binding.

The first volume in this series contains, among other things, the first publication of material from the Oral History Project of Columbia University. This comprises the recollections of Albert Lasker, who was a central force in the creation of modern advertising in America. There is a fascinating letter from Theodore Roosevelt to David Gray, reporting his experiences at the funeral of King Edward VII. Allan Nevins provides an illuminating character sketch of Henry Ford. Cleveland Amory furnishes a study of club life in America. T. Harry Williams in "Investigation: 1862" reminds us that the use of the congressional investigatory power for political purposes is not a new phenomenon in our history. An abridgment of Paul Horgan's "Great River", the Rio Grande, is included. The illustrations are beautifully done and include a collection of "Painters of the Plains" by Eugene Kingman. There are a book review department, a check list of new books and news of history.

We are assured a continuity in standards of editorship by the selection of Bruce Catton, author of *A Stillness at Appomatox,* as editor.

The quality and the price of this and the succeeding volumes of *American Heritage* should make this a successful venture.

KENNETH S. CARLSTON
University of Illinois Urbana, Illinois

SUCCESSFUL MANAGEMENT OF MATRIMONIAL CASES. *By Howard Hilton Spellman. New York: Prentice-Hall, Inc. 1954. $5.65. Pages 306.*

This title leads one to expect another how-to-do-it book, *e.g.,* how to win a divorce case. It is that all right, but it is so much more that one meets surprise and delight as he turns the pages. At the outset we are reminded that the handling of a matrimonial case calls for more than the solution of a mere legal problem, to wit, for "alleviation of the basic social difficulties underlying the legal cause of action".

Weight is lent to the author's observations by the fact that he is a practicing lawyer who has won his wisdom the hard way, struggling with litigants and lawyers in New

York City, in and out of court, for thirty-three years. And he has served in public office, as an assistant district attorney and member of a city council.

He starts out with a half dozen bits of practical advice to the lawyer on the much neglected problem of how to handle his client, pointing out that domestic dislocations "do not spring full-blown from a vacuum. One or both of the parties may have defects of personality, which have contributed to the destruction of their union. You have at least a fifty per cent chance that your client will be the one with an unpleasant and irritating personality."

Despite this and other drawbacks to handling divorce cases, the author refuses to condone the aloofness from divorce of "certain of our brethern at the bar", an attitude he terms "social snobbishness". He gently scolds them with the reminder that "the simplest considerations of justice and decency must dictate that the future of a family is at least as important as the future of a mortgage or a business".

Pointing out that "the lawyer is faced by the need to understand the psychological motivations of the parties"—a phase we fear to be largely ignored in most jurisdictions—the author urges willingness to use extra-legal assistance, while warning that if the "lawyer should, upon the basis of scattered reading, set himself up as a sort of amateur psychologist", it could result disastrously, for "reading will not qualify you to undertake curative measures".

Reasons for divorce are distinguished from grounds for divorce and it is "reprehensible for the lawyer to outline various grounds . . . and then to ask the client to tell his story" for "too many clients are prone to conjure up a tale of woe in order to meet the legal requirements".

"The highest duty of a lawyer engaged in a matrimonial case is to explore the possibilities of effecting a reconciliation between the parties." This challenge introduces a very helpful chapter, filled with bits of advice and common sense, *e. g.*, at the outset avoid antagonizing the opponent needlessly; avoid threats and specific accusations; avoid inference your client is after money only; seek out opposing counsel for a conference (it won't weaken your position!); sit down and talk it over; beware of the acrimony that creates stubborn unwillingness to abandon previously stated positions; "do not leave the question of settlement until the date of trial"; "do not expect the trial judge to get your case settled for you"; when seeking settlement, eliminate discussion of wrongdoing of either party; when exploring reconciliation, the wrongdoing and its motivation must be analyzed.

Then follows a discussion of five of the more common symptoms: money, sex, in-laws, indifference and infidelity and suggestions for their analysis to learn "what original stone caused the avalanche". It is assumed that the lawyer is qualified to make this analysis. In some cases, perhaps; how nice it would be if we all were competent to do so in all cases! At this point it might have been helpful if the author had considered some of the indicia whereby cases requiring the outside help he advocates—marriage counselors, clinical psychologists, psychiatrists, etc.—could be screened out by the lawyer before he muddies the water.

In dealing with separation agreements the author raises the ever-timely warning that the parties are not free to contract as their fancies dictate, but must negotiate with the state looking over their shoulders because of its interest in the preservation of marriage; and we are reminded that even the disposition of an estate after both spouses are deceased may hinge upon the validity of a foreign divorce and the legality of a separation agreement.

Unfortunately the author gives circulation to the notion that alimony "is in the nature of a penalty imposed on the husband for his misconduct" as well as support, an idea increasingly recognized as hampering the salvaging of disintegrating marriages. Although, fortunately, this is not the prevailing legal concept in all jurisdictions, considerable space is devoted to the techniques of obtaining evidence of misconduct; and since the book is the product of a New York background we find blueprints for conducting apartment and hotel raids, wiretapping, etc.

The admirable social conscience of the author comes to the fore again when he charges that "the lawyer has a special responsibility in connection with custody applications. He must act as a brake on his client's emotional drives. He must take pains to point out the fact that a child cannot be regarded as a pawn in the contest between the parents and that the custody of the child should not be used for bargaining purposes with respect to alimony."

Practical considerations dominate in discussing "utilizing emotional basis for decision". The lawyer is told how to create opportunities "to use emotion-charged proof" for the purpose of trying to justify acts of wrongdoing or to "prejudice" the triers of fact against the offender. Concededly this "emotional or inflammatory matter" is not to be used "where complete denial is possible" or "where the opponent's proof can be destroyed by cross-examination or counter-proof".

The striking thing about this line of advice is not alone that it seems to assume that a judge hearing a case without a jury is as gullible or as susceptible to emotional attack as a jury. But in its frank emphasis upon ways to win, it lends support to the thesis that a trial is not primarily a search for truth and that "the truth is not always in a trial" (Botein, *Trial Judge*), but a trial "is a kind of fight or combat" (Frank, *Courts on Trial*) and resembles the historic ordeal by battle wherein the lawyers tilt as champions of the litigants.

And when the author says that given certain evidence "the disbelief of the judge may change to the type of envious wonder that leads to large alimony awards", one wonders about the judges with whom he has had contact. Our sympathy for the

judges grows when we come across phrases like: ". . . the witness is instructed to bring in matter of an emotional nature when a specific opportunity arises"; "go as far as the judge will permit you"; "as prominent . . . as forbearance of the judge . . . will permit"; "the rules concerning hearsay evidence may prevent you . . . . However, make an effort to do so until you are stopped by sustained objections."

And after the decree has been obtained and post-decretal matters are before the court, the author decries the unwillingness of the court to send a man to prison and declares that the "emotional impact of presented facts plays an important part". So he recommends graphic portrayal of human distress, even to the point of verbosity!

Ethical aspects are in evidence again when the author treats of foreign divorces with helpful classification and simplification. "Thus, it is improper for a lawyer to send his client to a correspondent attorney in a foreign state, when he knows that it is the intention of the client to set up a fictitious residence." When a client asks how best to simulate a residence "an attorney who gives this type of advice even in the most general terms is a traitor to his profession".

After the battle is over, "when the traumatic effects of litigation are still fresh", is when "the imagination, compassion, and skill of the attorney come into play", and "if, instead of cold-bloodedly treating the decree breach as a matter to be handled only on a legal basis, he is willing to evaluate the underlying human problem, the lawyer's potentialities for the alleviation of distress are unbounded".

While the book is mainly a text and guide for the practitioner, filled with practical advice and admonition (there are five or six invaluable check-lists), nevertheless the author never loses sight of "the underlying human problem"—unless perhaps in dealing with the court, where the will to win seems to have a tendency to obscure the finer ethical considerations (as it so generally does in life outside of books.)

Altogether one is led to wonder. Are judges as well as juries fair game? Do we have a double standard of ethics, one with respect to the parties, another for the court? Is playing according to the rules in a trial passé and for simpletons, as in some athletic contests?

This book understandably has a New York orientation. Do the great bar associations of New York advocate, or even tolerate, this apparent ethical ambivalence? And what type of judge is so susceptible to the emotional type of tactics? And how are such judges selected?

Unfortunately judges must be drawn from a few species of the genus homo. No supply of supermen is presently available. Few judges deny they are human. Nevertheless this reviewer suspects that a judge in deciding how to operate upon a family is swayed by emotional appeals to just about the same extent as a surgeon deciding how to operate upon a patient.

And we can gratefully report that we know many lawyers, who, in the heat of a court battle would still hesitate to behave like the naughty boy who in disobeying parental rules goes as far as he can without provoking a spanking.

One thing this book clearly demonstrates without even mentioning the subject: there must be some better way to handle matrimonial cases than the traditional trial in the conventional court.

PAUL W. ALEXANDER
Court of Common Pleas
Toledo, Ohio

AN ALMANAC OF LIBERTY. *By William O. Douglas. Garden City, New York: Doubleday & Company, Inc. 1954. $5.50. Pages 409.*

With a short half- to a full-page essay for each of the three hundred sixty-six days of a year, commencing appropriately with July 4 and ending with July 3, Mr. Justice Douglas presents facts and events in *An Almanac of Liberty* that explicitly tell the import of the struggle for liberty in English and American history and impliedly emphasize that the pursuit of liberty is a continuing, daily task. As he succinctly puts it: "No cleavage will occur if we remember our spiritual heritage and are true to it. There is room in this great and good American family for all the divinities the Creator has produced in man. Our *Constitution* and our *Bill of Rights* were, indeed, written to accommodate each and every minority, regardless of color, nationality, or creed. That is our democratic faith. Out of that diversity can come a unity the world has never witnessed. The need these days is to practice and preach that democratic faith."

Interesting and significant incidents about various facets of the Bill of Rights, and other aspects of our Constitution, some details little known and happily supplied by the research staff employed by the author, are clearly presented together with apt summaries of pertinent Supreme Court decisions, all without footnotes or citations to bog the attention of the lay reader to whom the work is primarily though not entirely addressed. If you are curious, test yourself as to what you can recall about the following names and then turn to the book at random for illuminating answers. What do you, for example, know about James Aither, Matthew Lyon, William Ireland, William Bradford of Pennsylvania, Joel Barlow, Elijah P. Lovejoy, Margaret Douglass, William Goddard or Silas M. Stillwell? The answers will lead you through tales of interest in the thrilling story of our Anglo-American struggle for its prized liberty.

Also in the background is the significance of this story for the present day of dire drama. It is as if the author were saying to his readers, "I have told you much in prior books about other lands and other peoples. Now listen about ourselves and consider with me our situation."

This is what we should mean to ourselves and to the rest of the world: "These and other rights gain much of their inspiration from our

own *Declaration of Independence* and *Bill of Rights*. This *Declaration* may in legal effect have no binding consequences in any land; it may be only a reaching for the stars. But it lifts the hearts of men the world around. For it states in solemn and dignified terms the aspirations of men and women of good will of every race."

This is the essence of the view of one who has long been a fighter for the liberty he describes. Yet there are many under-currents in this work which can give pause and justify dissent from the views of this dissenter. Not all will concur, for example, in his criticism of the Nuremberg Trial, his attitude toward the Smith Act, or his slighting of the value of Holmes as against his own heroes, Brandeis, Hughes and Stone. One can but say, as the author did of Chief Justice Stone: "It is hard to know what the influences are that shape one's philosophy of life. Some are in the genes of the bloodstream. Some go back to happenings too distant to remember. Some come raw from experience." Perhaps someday Mr. Justice Douglas will pause to tell us more of the influences that shaped his philosophy. Meanwhile one can read between the lines of these pregnant pages.

LESTER E. DENONN
New York, New York

THE LAW OF PRIMITIVE MAN: *A Study in Comparative Legal Dynamics. By E. Adamson Hoebel. Cambridge, Massachusetts: Harvard University Press. 1954. $5.50. Pages viii, 357.*

We bend so intently over tasks of winning cases and problem-solving that we become astigmatic in our thinking. Our minds, as well as our eyes, are refreshed by occasionally focusing our attention on far horizons. Lawyers and judges alike have often observed this, but the demands of the moment press in upon them. There must be many "far horizons" to be commended to lawyers. I have found one which, perhaps, will appeal to others: primitive law.

The broad field of primitive law may be somewhat arbitrarily, but usefully, divided between the ancient and the modern. While ancient law, such as that of the Sumerians and the early Hebrews, may be of greater interest historically, contemporary systems which have archaically survived among relatively isolated and primitive peoples offer the decided advantage that they may be critically studied as living systems. Dr. Hoebel's compact study of five societies—the Eskimo, the Philippine Island Ifugao, the Indians of the Western U.S. Plains (the Comanche, Kiowa, and Cheyenne), the Trobriand Islanders of the Pacific, and the Ashanti of West Africa—falls in this latter class, the "contemporary" primitive. The writer is head of the Department of Anthropology, University of Wisconsin, and author of a number of volumes on primitive law, including the modern classic, *The Cheyenne Way*, written in collaboration with the ever-stimulating Karl Llewellyn. In dealing with the Indians he draws on his own extensive studies; as to the other four societies, he presents a synthesis of the findings of other investigators. Viewing law through the eyes of an anthropologist he is interested in its effect upon man's behavior as a social being. This approach brings refreshing and rewarding insights into the meaning of law in any society.

The Eskimo, who knows neither wealth nor class, will lend his wife to a friend and often settle "litigation" by a public song-duel with his adversary. The head-hunting Ifugao, who treasures rice and despises sweet-potatoes, may sell a potato field without witnesses but requires a formal feast-conveyance for a rice-field. Incidentally, before an Ifugao divorce both parents must assign all their "real" property to their children, a device which many will consider anything but "primitive".

In the Trobriand Islands, where inheritance is traced through the mother and the father is not even a blood-relative, one is born to a class-status, but may raise himself in prestige by accumulating gardens and by generously giving to others, much as the Ifugao who must feast the district before he can elevate himself to a *hadangyang* with a lounging bench before his home. Among the Ashanti, who also trace lineage through the mother, not only might a man be sold into slavery to pay a debt, but failure to pay even a small bill could be a capital offense. To them crime was also a sin, punished by the ancestral spirits, a view more than faintly reminiscent of Mosaic law, as was their religious abhorrence of incest and punishment of it by death. Dr. Hoebel comparatively treats three Indian tribes: the backward Comanche, who shared his wife with his brothers but was allowed to kill a thief who stole his favorite horse; the intermediate Kiowa, whose society fell into four distinct classes and which was actually governed by military fraternities; and the advanced Cheyenne, with his council-government deriving its power from the gods and encouraging individualism within a circle of group well-being.

The book closes with informative comments on the relation of magic and religion to law and on the function and use of law in even the simplest and most rudimentary societies, with a final chapter adding material on other primitive societies and summarizing such generalizations as may be safely made in the field of primitive law. Dr. Hoebel is both critical and discerning, as, for example, when he defends Maine's theories of the religious origins of law against such unduly severe critics as Dr. Diamond. The book is written with the technical precision, and in the language, of the professional anthropologist. It is definitely not pipe-and-slipper reading, such as flows with such apparent ease from the fluent pen of his Wisconsin colleague, Dr. William Howells. Much of it calls for the straight-back chair of the scholar. This characteristic was accentuated for this reviewer by Dr. Hoebel's enthusiasm for Hohfeld's "legal algebra", my tepid attitude toward which invokes the late Justice Jackson's comment that it is "either very profound or almost un-

intelligible, I cannot be sure which," 320 U. S. 661, 679 (1944). To offset this bit of pique—one of the inalienable rights of a reviewer—I hasten to add that, although this volume can scarcely be commended to one seeking an introductory primer in anthropology, I know of no other volume which so compactly or so completely presents the essence of what is known to scholars concerning "contemporary" primitive law. The lawyer who reads it will find many quaint bits to liven up his speaking and writing and, incidentally, some of these primitive solutions to age-old legal problems may well offer fresh stimulation for re-thinking legal problems whose traditional solutions have been taken too much for granted.

DILLARD S. GARDNER
Supreme Court Library
Raleigh, North Carolina

MODERN BUSINESS LAW. *By A. Lincoln Lavine. New York: Prentice-Hall, Inc. 1954. $9.00. Pages 970.*

At last count, the eighty-seven volumes of *Corpus Juris Secundum* occupied more than eighteen feet of library shelving. And, as every lawyer will agree, that is a lot of lawbooks. Yet, it must be remembered that *C.J.S.* is publishing still more volumes in order to complete the set, and even when the set is completed it will not fully supersede its predecessor, *Corpus Juris*. And, as every lawyer will agree, even this mammoth work is inadequate in explaining the complications and complexities of American law.

Who dares to detail and explain our law in briefer format? Who has the temerity to condense and condense again to produce a commentary which will be complete, accurate, informative and useful within the confines of a single volume?

The lawyer will meet every challenge. The ranks of the profession abound with men of daring and men of temerity. The book publishers are eternally optimistic. And like so much newsprint, the books on law "in one easy volume" roll from the presses.

A. Lincoln Lavine, who is best known to the organized Bar for his outstanding service to the profession as the longtime Chairman of the Public Relations Committee of the New York County Lawyer's Association, has written such a book. As chairman of the law department at St. John's University School of Commerce (as well as a practicing attorney) he felt the necessity for a convenient, easy-to-read summary of the law which could be used in the classroom—not a classroom of neophyte lawyers, but a classroom of would-be men of business.

Author Lavine has succeeded in his mission where others have failed. His work is rapidly becoming the standard text for the teaching of business law in the many schools of commerce and finance. This in itself is an indication of merit and of the fact that a satisfactory contribution to the dissemination of legal learning has been made.

The reviewer of every book on "law for the layman" is sorely tempted to display his erudition by pointing out inaccuracies and overstatements; he is wont to conclude his analyses with the cryptic comment that no book of a mere 1,000 pages can do more than scratch the surface of American jurisprudence. But these comments are out-of-order in a review of *Modern Business Law*. Author Lavine would not want his chapter on contracts to be used as a reflection of his total knowledge in that field. Yet even a detailed reading of that chapter fails to reveal any significant omissions or overstatements. Certainly it contains more than even the best of what law students are expected to remember from their courses in that subject.

Chapter 13 is of particular interest. Within the confines of forty-five pages the reader and student is given a bird's-eye view of "The Regulation of Business". There is a discussion of police power, there is an analysis of the commerce clause, there is an introduction to anti-trust legislation, and there is a sound presentation of the basic rules of trade infringement, price discrimination, false advertising and other aspects of unfair trade practices.

Perhaps the best example of author Lavine's daring and temerity is his attempt to explain the law of evidence in a brief nine pages. Even Wigmore couldn't do that. Yet the summary, filled with numerous illustrations, is surprisingly complete and contains a wealth of accurate and useful information.

Modern Business Law is a valuable book. Filled as it is with questions, problems and court cases for review, it is an excellent tool for the teaching of commercial law. It is a book which the practitioner can recommend without hesitancy to those who seek a primer in the law.

ALBERT P. BLAUSTEIN
New York Law School

Review of Recent Supreme Court Decisions

George Rossman
Editor-in-Charge

Constitutional Law . . .
Validity of state statute permitting direct actions against an insurance company

■ *Watson* v. *Employers Liability Assurance Corporation, Ltd.*, 348 U. S. 66, 99 L. ed. (Advance p. 90), 75 S.Ct. 166, 23 U. S. Law Week 4045. (No. 6, decided December 6, 1954.) *Judgment of the Court of Appeals for the Fifth Circuit reversed.*

This case upheld the validity of a Louisiana statute permitting a direct action against a liability insurance company in spite of a clause in the insurance contract prohibiting such direct action.

The contract was negotiated in Massachusetts and delivered in Massachusetts and Illinois. One of the appellants, a resident of Louisiana, bought and used in that state "Toni Home Permanent", a hair-waving product alleged to contain a highly dangerous latent ingredient. Suit was brought in Louisiana for the injuries suffered from use of the product. The Louisiana statute permits such suits directly against the insurer in spite of the fact that the insurance contract was made in another state and contains a clause forbidding such direct actions.

Mr. Justice BLACK, speaking for the Court, held that Louisiana has a constitutional right to subject foreign liability insurance companies to the direct action provisions of its laws. The Court said that the denial of equal protection and impairment of contracts arguments advanced by the insurer were "wholly void of merit", since the direct action provisions fall with equal force upon foreign and domestic insurance companies and became effective before this insurance contract was written.

As for the due process question, the Court pointed out that Louisiana was not seeking to meddle in affairs beyond her borders. "Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them."

As for the full faith and credit clause, the Court held that that clause "does not automatically compel a state to subordinate its own contract laws to the laws of another state in which a contract happens to have been formally executed. Where, as here, a contract affects the people of several states, each may have interests that leave it free to enforce its own contract policies."

Mr. Justice FRANKFURTER, in a concurring opinion, argued that the Court should have rested its holding on the right of Louisiana to condition the insurance company's permit to do business in the state.

The case was argued by Richard H. Switzer and Cleve Burton for appellants and petitioners and by Benjamin C. King for appellee and respondent.

Courts . . .
Diversity jurisdiction of federal courts under the Louisiana direct action statute

■ *Lumbermen's Mutual Casualty Compay* v. *Elbert*, 348 U. S. 48, 99 L. ed. (Advance p. 83), 75 S. Ct. 151, 23 U. S. Law Week 4050. (No. 11, decided December 6, 1954). *Judgment of the Court of Appeals for the Fifth Circuit affirmed.*

This was another case involving the Louisiana direct action statute; the case raised questions about the diversity jurisdiction of the federal courts over actions arising under the statute.

The respondent was a citizen of Louisiana who was injured at Shreveport in an automobile accident allegedly caused by the negligence of another Louisiana resident. The petitioner was an Illinois insurance corporation that had issued a public liability policy to the allegedly negligent driver. Petitioner had been granted a certificate to do business in Louisiana and had consented to be sued directly for damages sustained in Louisiana accidents. Suit was brought in a federal court, which dismissed on the ground that there was no diversity of citizenship. The Court of Appeals reversed.

The CHIEF JUSTICE delivered the opinion of the Court affirming. In rejecting the petitioner's argument that the "matter in controversy" was the underlying tort liability of the alleged tortfeasor, which would of course mean that there was no diversity of citizenship since the tortfeasor was a Louisiana resident, the Court found that Louisiana has differentiated between actions brought by an injured party against the insurer alone and actions brought against either the tortfeasor alone or together with the insurer. While there must be proof of negligence in both types of action, the plaintiff must also establish the liability under the policy when the insurer alone is sued, and the Louisiana courts have characterized the direct action statute as creating a separate and distinct cause of action. In view of this, the Court held, the insurer was the real party in interest, and the requisite diversity existed.

The Court also refused to find that the alleged tortfeasor was an indispensable party and rejected a sug-

Reviews in this issue by Rowland Young.

gestion that federal courts, as a matter of discretion, should decline to exercise their jurisdiction over suits against the insurer alone.

In a concurring opinion, Mr. Justice FRANKFURTER declared that this case was an example of the "glaring perversion of purpose" of the original grant of diversity jurisdiction, since it involved a citizen avoiding the courts of his own state in order to take advantage of the jury trial afforded in a federal court with its restrictive review of jury verdicts.

The case was argued by Charles L. Mayer for petitioner and by John M. Madison and Whitfield Jack for respondent.

Criminal Law . . .

Trial and conviction of prisoner when he was allegedly of unsound mind and unassisted by counsel

■ *Massey* v. *Moore* 348 U. S. 105, 99 L. ed. (Advance p. 117), 75 S. Ct. 145, 23 U. S. Law Week 4033. (No. 119, decided December 6, 1954.) *Judgment of the Court of Appeals for the Fifth Circuit reversed.*

A conviction cannot stand when the accused had no counsel and was allegedly insane at the time of trial. In this decision, the Court held that such a trial lacks the element of fairness required by the Fourteenth Amendment.

The petitioner was tried in a Texas court and convicted of robbery. He had been confined to the psychopathic hospital of the state prison for several months prior to trial. He was removed from a strait jacket on March 7, 1941, and tried March 11. He had no counsel, though the crime carried a mandatory life sentence because he had two prior felony convictions. Shortly after his conviction, the prisoner tried to commit suicide and was sent back to the psychopathic ward. While he was so confined, the time for appeal of his conviction expired. The Texas courts afterward denied him relief because the issue of insanity could be raised only on appeal, not collaterally. The federal district court denied a writ of habeas corpus and the Court of Appeals affirmed.

In reversing, Mr. Justice DOUGLAS, speaking for the Court, declared that the petitioner was entitled to a hearing on the issue of insanity at the time of his trial which had been denied him. "The requirement of the Fourteenth Amendment is for a fair trial" the Court said. "No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court."

The case was argued by Dean Acheson for petitioner and by James N. Castleberry, Jr., for respondent.

Criminal Law . . .

Failure to secure approval of the Attorney General before indicting taxpayer for income tax evasion

■ *Sullivan* v. *United States*, 348 U. S. 170, 99 L. ed. (Advance p. 159), 75 S. Ct. 182, 23 U. S. Law Week 4019. (No. 64, decided December 6, 1954.) *Judgment of the Court of Appeals for the Tenth Circuit affirmed.*

Failure of a United States Attorney to secure approval of the Attorney General before obtaining an indictment for income tax evasion does not bar prosecution for the offense, so the Court held in this opinion.

Sullivan was found guilty of making and filing false and fraudulent income tax returns. He received a sentence of three years' imprisonment and a fine of $13,000. The evidence upon which the charges were based was presented to the grand jury without direction to do so by the Attorney General. In seeking a review of his conviction, the petitioner contended that this failure was a violation of 26 U.S.C. § 3740 ("No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless . . . the Attorney General directs that the suit be commenced") and Section 5 of Executive Order No. 6166 and Circular Letter No. 2431 (both of which direct United States Attorneys to present evidence of tax evasion to the grand jury only when authorized to do so by the Department of Justice.)

Mr. Justice MINTON, speaking for a unanimous Court, upheld the conviction. Section 3740, the Court said, applies only to civil suits and not to criminal prosecutions, while the Order vests responsibility for prosecution of criminal proceedings in the Department of Justice but does not direct how that responsibility should be exercised. The U.S. Attorney was a representative of the Department, and while his action was a violation of the Circular Letter, the Court said, that letter is merely a housekeeping provision of the Department which does not curtail or limit the power of a grand jury to consider and investigate any alleged crime within its jurisdiction.

The Court also denied petitioner's attempt to withdraw his plea of *nolo contendere*, which he sought on the ground that he had been "misled" by Government counsel into believing that he would receive probation.

The case was argued by Llewellyn A. Luce for petitioner and by Charles F. Barber for respondent.

Criminal Law . . .

Use of "opening net worth" of taxpayer in prosecutions for income tax evasion

■ *Holland* v. *United States*, 348 U.S. 121, 99 L. ed. (Advance p. 127), 75 S. Ct. 127, 23 U. S. Law Week 4024. (No. 37, decided December 6, 1954.) *Judgment of the Court of Appeals for the Tenth Circuit affirmed.*

In this, the first of four similar cases decided on the same day, the Court upheld the validity and defined the scope of so-called "net worth prosecutions" for income tax evasion. In a net worth prosecution, which the Government has increasingly relied upon in recent years, to show tax evasion, the total net value of a taxpayer's assets at the beginning of a given year is compared with the net value for succeeding years. Allowance is made for expen-

ditures and the taxpayer's reported income for the years in question. Any substantial unaccounted for increase in net worth is said to represent unreported taxable income.

In the *Holland* case, the Court, speaking through Mr. Justice CLARK, discussed the general problem of this type of proof and the weaknesses of the basic assumption that unexplained increases in net worth mean unreported taxable income. The danger that a jury may assume, once the net worth computation is established, that the crime of tax evasion automatically follows, the possibility of a shift of burden of proof to the taxpayer, the prosecution's ability to pick and choose from the taxpayer's statements, relying only on the favorable portion and minimizing what does not bolster its position—these and other pitfalls inherent in the net worth method, the Court said, "require the exercise of great care and restraint" in allowing its use.

The facts in the *Holland* case were these: using the net worth method, the Government showed that the taxpayers' assets were $19,152.50 at the beginning of 1946. In three years, their apparent net worth increased by $113,185.32. The evidence for the year 1948, the year for which they were convicted, indicated that their net worth increased by some $32,000 while they reported less than one third of that sum on their tax return. The Hollands explained the difference by saying that they had some $113,000 in currency accumulated prior to 1933, which they had never dipped into until 1946. This $113,000, according to the taxpayers, was kept in a canvas bag, a suitcase and a metal box, and was not included in the Government's opening net worth figure of $19,152.50.

The Government did not directly refute this contention, but relied on the inference that anyone who had over $100,000 in cash would not have undergone the hardships endured by the Hollands during the 1920s and the 1930s. In that period, they had lost their cafe business, accumulated $35,000 in debts that were never paid, lost their household furniture because of an unpaid balance due of $92.20 and were even forced to separate for eight years because of their economic situation. This evidence, the Court decided, fully justified the jury's conclusion that there was no $100,000 cache of money.

Another requirement in the use of the net worth method, the Court said, was the presentation of evidence showing that the taxpayer's net worth increases are attributable to currently taxable income. This requirement was satisfied as to the Hollands by a showing that the profits from the hotel they operated fell to about one fourth what it had been under the former owner after the Hollands took over the management, although apparently the amount of business increased. It was also shown that the books of the hotel did not record all the receipts.

Wilfulness, another element necessary to be proved, was found in the consistent pattern of underreporting of large amounts of income and the taxpayers' failure to include all their income on their books and records.

The case was argued by Sumner M. Redstone and Peyton Ford for petitioners and by Marvin E. Frankel for respondent.

■ *Friedberg* v. *United States,* 348 U. S. 142, 99 L. ed (Advance p. 140), 75 S. Ct. 138, 23 U. S. Law Week 4032. (No. 18, decided December 6, 1954.) *Judgment of the Court of Appeals for the Sixth Circuit affirmed.*

This was the second of the so-called "net worth prosecution" cases decided by the Court. The taxpayer here concentrated his fire on the sufficiency of the evidence as to his opening net worth. Like the Hollands, Friedberg sought to account for the discrepancy between his opening net worth and the later net worth figures by claiming that he had a hoard of some $60,000 that was not included by the Government in computing his opening net worth. The Government's evidence did not directly dispute this, but it outlined his finances from 1922 through the prosecution years, indicating that until 1937 the taxpayer had either filed no income tax return at all or had paid only nominal taxes. A mortgage on his home was foreclosed in 1937, and a deficiency judgment entered for $3,500. A writ of execution was returned "nothing found" in 1939, and he then settled the judgment for $100 in return for a release from the mortgagee. In an application for a loan, the taxpayer had stated in 1939 that his assets were $9,200. His average pay during the period was $50 a week.

Mr. Justice CLARK, again speaking for the Court, held that this evidence justified the jury in finding that no hoard of $60,000 could have been accumulated between 1922 and 1941.

The case was argued by Robert N. Gorman for petitioner and by H. Brian Holland for the respondent.

■ *Smith* v. *United States,* 348 U. S. 147, 99 L. ed. (Advance p. 143), 75 S. Ct. 194, 23 U. S. Law Week 4020. (No. 52, decided December 6, 1954.) *Judgment of the Court of Appeals for the First Circuit affirmed.*

In the third of these "net worth prosecutions", the issues centered around a statement signed by the taxpayer and delivered to Government agents along with a check for the amount of tax he thought due and owing. The taxpayer objected to the use of this statement as evidence, contending that it lacked proper corroboration.

The taxpayer and his wife were persons of moderate means until 1945. In that year, the taxpayer acquired a racing news service, and in the four-year succeeding period he acquired a large amount of visible wealth in the form of bank accounts, real estate and other assets. The evidence tended to indicate an unreported income of more than $190,000 in the four-year period.

The opinion of the Court was again written by Mr. Justice CLARK. He overruled the taxpayer's objection to the admission of his statement to the Government agents, saying that that issue had been submitted to the jury and rejected. The taxpayer claimed that the agent had

agreed to close the case and grant him immunity, and that the failure to do so constituted "fraud or deceit".

The Government had used the figures furnished in the taxpayer's statement in determining his opening net worth. Since there is no tangible injury that can be isolated as the *corpus delicti* in a crime such as tax evasion, the Court was faced with the choice of holding that independent evidence was necessary to implicate the accused here or of holding that no corroboration was necessary because the nature of the crime made it impossible to furnish a *corpus delicti* distinct from the identity of the accused. The Court chose to adopt the former rule.

The Court found sufficient independent evidence corroborating the statement and the opening net worth in the facts that petitioner had filed no returns for the years 1936-1939, non-assessable returns for 1940 and 1942, and in the taxpayer's employment record prior to 1945.

The case was argued by W. Arthur Garrity, Jr., for petitioners and by Marvin E. Frankel for respondent.

■ *United States* v. *Calderon*, 348 U. S. 160, 99 L. ed. (Advance p. 152), 75 S. Ct. 186, 23 U. S. Law Week 4029. (No. 25, decided December 6, 1954.) *Judgment of the Court of Appeals for the Ninth Circuit reversed.*

This was the fourth of the net worth prosecution cases. Like the *Smith* case, *supra*, the taxpayer challenged the sufficiency of the evidence needed to corroborate his out-of-court statements about his opening net worth. Unlike the *Smith* case, there was not enough evidence of the taxpayer's financial history to substantiate his opening net worth directly.

The Government's evidence tended to show net worth increases of $62,993.47 for the four-year prosecution period; during that time the taxpayer declared only $16,775.14 on his tax returns. He argued that the only evidence tending to substantiate the Government's figures as to the opening net worth was his own admission, and therefore, lacking independent evidence of a *corpus delicti*, the conviction could not stand.

The Court, speaking through Mr. Justice Clark, ruled, however, that there was enough evidence, apart from the taxpayer's statements, to establish the existence of an offense, without resort to the net worth method. Thus it was shown that the taxpayer's records of receipts of income were incomplete while his visible assets greatly increased during the time in question. His reported income was only $4,775 in excess of his living expenses, but his bank balances increased by over $16,000, he added $1,000 to his holdings of saving bonds, increased his investments in real estate by $9,000 and poured more than $22,000 additional capital into his business. "These increments, when considered in the light of respondent's receipt of unrecorded amounts of taxable income, are sufficiently at variance with his reported income to support an inference of tax evasion" the Court said. There was said to be "even more conclusive corroboration" in respondent's testimony during his trial that he had had $16,900 cash on hand at the beginning of the prosecution period, while his original statement to the Bureau had been that he had only $500. "There could hardly be more conclusive independent evidence of the crime" the Court declared.

Mr. Justice DOUGLAS dissented without opinion.

The case was argued by H. Brian Holland for petitioner and by Joseph W. Burns and Norman Herring for respondent.

What's New in the Law

The current product of courts, departments and agencies

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Attorneys . . . *and taxation*

■ The United States Tax Court has turned down the attempt of an attorney employed in Washington to take Schedule-C deductions for the expenses of keeping open a law office in his North Dakota hometown.

The taxpayer was employed in Washington in the Justice Department from 1944 until the end of 1953. He had practiced in Grand Forks from 1916 until he went to Washington, and he resumed his practice there in 1954. The return involved was for 1947, for which year the taxpayer claimed the expense of maintaining his Grand Forks office as the expense of carrying on a trade or business under I.R.C. §22 (n) (1). His only income in 1947 was from governmental employment, and he had apparently not been in North Dakota during that year.

The Court declared that the expenses were not deductible as business or trade expenses because the taxpayer was not practicing law in 1947 in Grand Forks, but was merely maintaining an office to have ready for his use upon return to private practice. The expenses were incurred, the Court said, in preparation for the resumption of a trade or business, and that therefore the case was somewhat analogous to expenses incurred in preparation for engaging in a trade or business, which have frequently been held not deductible as trade or business expenses.

(*Owen* v. *Commissioner*, U.S. Tax Ct., November 30, 1954, Fisher, J., 23 T.C. No. 46.)

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

■ A Kansas lawyer thought he had the answer to non-coverage of the legal profession under social security. His approach was simple: since he filled out income tax returns, he counted himself as an "income tax computer", segregated his earnings from this activity and claimed it was "self-employment income" within the meaning of the Social Security Act [42 U.S.C.A. §301 *et seq.*]

After payment of the self-employment tax for six calendar quarters, he applied for old-age insurance benefits. A referee determined that the attorney's income from his tax computing services was derived from a "trade or business" within the meaning of the Act and that he was entitled to old-age benefits. The Department of Health, Education and Welfare's Appeals Council, on its own motion, reviewed the referee's decision and reversed, holding that income-tax computing was the "performance of service by an individual in the exercise of his profession as a . . . lawyer" and accordingly exempt from self-employment tax and social-security coverage.

The United States District Court for the District of Kansas affirmed the Appeals Council's ruling on the ground that its review was limited only to determining whether the Council's decision was supported by substantial evidence. If the issue were triable *de novo*, the Court declared, its decision "might be difficult".

(*Shelden* v. *Hobby*, U.S. D.C. Kan., October 28, 1954, Mellott, J., 125 F. Supp. 263.)

Criminal Law . . . *illegally obtained evidence*

■ The Court of Appeals for the Eighth Circuit has refused to deviate from the rule that illegally obtained evidence obtained by state officers operating entirely on their own is admissible in a federal court.

The evidence in the instant case—fourteen capsules of heroin hydrochloride—was found by Kansas City detectives, quite by accident, in a flashlight belonging to a suspect picked up on a robbery charge. The capsules were allowed in evidence on the defendant's trial in the federal court.

The rule allowing the Federal Government to avail itself of evidence obtained illegally solely by state officers comes from *Byars* v. *U.S.*, 273 U.S. 28. The rule has always been otherwise if any federal officers are involved in the search. As late as February of 1954 the Supreme Court adverted to the doctrine in *Irvine* v. *California*, 347 U.S. 128.

Noting these cases, the Court said it was not free to change the rule of the *Byars* case. As further indication, the Court observed that the Supreme Court has recently denied certiorari in two cases involving the point, *Serio* v. *U.S.*, 203 F. 2d 576, *cert. den.* 346 U.S. 887, and *Fredericks* v. *U.S.*, 208 F. 2d 712, *cert. den.* 347 U.S. 1019.

(*Jones* v. *U.S.*, C. A. 8th, December 15, 1954, Sanborn, J.)

Damages . . . *excessive*

■ Some whopping judgments obtained in a Maryland federal district court in an action under the Federal Tort Claims Act have been scaled down by the Court of Appeals for the Fourth Circuit, but even so, a new record in Maryland for a wrongful-death type judgment was set.

The case arose from the crash of a government airplane into the house of a sergeant who lived near Andrews Air Base in Maryland. In the house at the time were the ser-

geant, his wife, his two small girls, his sister and brother-in-law. The brother-in-law and the two children were killed and all the others received personal injuries. The Government admitted liability and only the question of damages was tried to the court.

Damages for the brother-in-law's death were set at $131,250. Maryland has no limit on a wrongful-death judgment, the measure of damages being the present value of the pecuniary benefit to which the widow and children have an expectation. The award was double any previously obtained in Maryland in a wrongful death case. The Court described the award as "clearly erroneous" because it was based on higher earning power than shown for the decedent, and reduced it to $87,500—still a record.

At the same time the Court reduced damages of $30,000 given the sister for personal injuries to $15,000, but left an award to the brother-in-law's administrator for the decedent's pain and suffering before his death at $5,000, plus funeral expenses.

For the deaths of the two children —one eight weeks and the other six years old—the lower court allowed the parents $8,000 for each for pecuniary loss. The Court remarked that it could not say that "the life of a little child is without pecuniary value, although it is practically impossible to determine what the value is". Each of these awards was reduced to $5,000, plus funeral expenses.

An award of $15,000 to the sergeant and one of $14,850 to his wife for their own personal injuries were left intact.

(U.S. v. *Guyer et al.* [six cases], C. A. 4th, December 28, 1954, *per curiam.*)

Fair Trade . . . *non-signers*

■ The Supreme Court of Oregon has avoided a ruling on the constitutionality of non-signer provisions of the state's fair trade law by holding that they cannot be given a retroactive effect. Accordingly, the Court decided, an injunction would not lie against a non-signer where he purchased goods when no fair trade law was in effect and resold the goods after the statute was in force.

Actually Oregon had a fair trade law, with non-signer provisions, on its statute books at the time the retailer involved in this case purchased his merchandise. But, the Court declared, in view of the Supreme Court's decision in *Schwegmann Bros.* v. *Calvert Distillers Corporation,* 341 U.S. 384, holding non-signer provisions in violation of the Sherman Act, the non-signer provisions of the Oregon statute had to be considered invalid and void until passage by Congress on July 14, 1952, of the McGuire Act [15 U.S.C.A. §45], which specifically validated non-signer clauses of state fair-trade laws.

While the McGuire Act may have given life to the state's non-signer provisions, the Court declared, it could not make their application retroactive so as to affect merchandise in a non-signer's hands but not yet offered for resale. The Court noted that the rationale of binding non-signers to a resale price structure was that the non-signer had at least constructive notice when he purchased fair-traded merchandise for resale that there were signers as to that merchandise. If, however, the purchases were made when non-signer provisions were invalid, the Court said, the rationale had no basis.

(Federal Cartridge Corporation v. *Helstrom,* Sup. Ct. Ore., November 24, 1954, Tooze, J., 276 P. 2d 720.)

Hatch Act . . . *application*

■ The United States Civil Service Commission continues to face difficult questions in applying the Hatch Act to persons subject to the Act but whose public jobs do not pay them as much as they otherwise make. The Commission has maintained that the term "principal employment" as used in the Act [5 U.S.C.A. §118k] really means "principal public employment" (see 39 A.B.A.J. 1098; December, 1953).

In a recent decision the person involved had served as a member of Vermont's old age assistance commission and later as the state's Commissioner of the Department of Public Welfare. In the former position he received only a per diem compensation, but in the latter $5,500 a year. During the time, however, his principal income was from farming.

The employee came under the Hatch Act because the state's public assistance activities are in part financed by federal grants. Since the employee's political activities were clear, the Commission held that his work in public assistance was his "principal [public] employment".

The employee raised the point that not all of his salary was derived from federal funds. This makes no difference, the Commission said, because the test of applicability of the Hatch Act is not the source of funds paid to the employee, but whether his employment is "in connection with" an activity financed at least partially through federal funds.

(Matter of Simpson, U.S. C.S.C., November 18, 1954, No. 197.)

■ The question whether the executive director of a local California housing authority had violated the Act was resolved in another case before the Commission.

The Act proscribes one covered employee from advising another employee to contribute "any part of his salary . . . to any party, committee, organization, agency, or person for political purposes". The housing director had sent a letter to employees of the housing authority recommending a percentage salary contribution to a campaign to defeat a constitutional amendment in California which would have required a referendum for establishment of low-rent housing projects.

The executive director contended that this was not such political activity as falls under the pall of the Hatch Act, since it was non-partisan and not connected with any political party. He further argued that the Federal Government, through the

Hatch Act, could not exercise control over state legislative functions.

The Commission rejected these contentions and ruled that "political purposes" need not be a cause of a political party, and that advising the contributions was political activity. The Commission stated the activities warranted removal of the employee.

(*Matter of Widmer,* U.S. C.S.C., June 15, 1954, No. 196.)

Housing . . . *loyalty oaths*

■ The Supreme Court of Illinois has ruled that the refusal of low-rent public housing tenants to sign a "loyalty oath" that doesn't provide for scienter does not afford grounds for the occupant's eviction.

The oath, required by a state statute, swore that the signer was "not affiliated directly or indirectly with any . . . organization or government which advocates the overthrow of constitutional government by force or other means not [constitutionally] permitted", and did not "directly or indirectly teach or advocate the overthrow of the government . . . by force or any unlawful means".

Relying on the Supreme Court's decision in *Wieman* v. *Updegraff,* 344 U.S. 183, the Court held that the oath offended due process because the fact of membership alone in an organization devoted to the proscribed objectives might deprive a tenant of the right to occupy public housing. The Court declared that the failure to provide for "knowing" membership voided the oath, and it refused to construe the wording of the oath to include the element of guilty knowledge or scienter.

In a companion case, the Court considered the failure of another tenant to sign a certificate of nonmembership in organizations on the Attorney General's subversive list, a certificate required by the Gwinn Amendment [42 U.S.C.A. §1411 (c)]. Without determining the constitutionality of the Gwinn Amendment, the Court ruled that the local housing authority, acting under the state statute, had no authority to adopt a resolution incorporating the Gwinn requirements in its rules, because such action had no relation to the statutory purpose of the state's act. "The purpose of the Illinois Housing Authorities Act", the Court remarked, "is to eradicate slums and provide housing for persons of low-income class."

A constitutional attack on the Gwinn Amendment in the Municipal Court of Appeals for the District of Columbia failed in *Rudder* v. *U.S.,* 105 A. 2d 741 (40 A.B.A.J. 873; October; 1954).

(*Chicago Housing Authority* v. *Blackman; Same* v. *Clark,* Sup. Ct. Ill., November 18, 1954, Klingbiel, J., 122 N. E. 2d 522.)

Husband and Wife . . . *test-tube babies*

■ In a decision of potentially far-reaching ramifications, a Chicago trial court has held that test-tube babies are illegitimate where the husband is not the donor and that the mothers of such babies are guilty of adultery. The ruling was made by Judge Gibson E. Gorman in the Superior Court of Cook County in a declaratory judgment entered in a divorce suit.

The husband, being sued by his wife for divorce, sought visiting privileges to see the couple's son. The son, however, was the product of the wife's artificial insemination in which a third-party donor was used. The evidence indicated that the husband had consented to the process and was present in the doctor's office at the time.

The Court turned down the husband's visitation privilege request, and said:

> Heterologous artificial insemination (when the specimen of semen used is obtained from a third party or donor), with or without the consent of the husband, is contrary to public policy and good morals, and constitutes adultery on the part of the mother. A child so conceived is not a child born in wedlock and therefore illegitimate. As such it is the child of the mother and the father [sic] has no right or interest in said child.

The Court also declared that homologous artificial insemination (when the specimen of semen is obtained from the husband) "is not contrary to public policy and good morals. . . ."

Since the decision was in a declaratory judgment without opinion, there was no indication of the Court's reconciliation of its holding with the definition of adultery. At common law adultery was the voluntary sexual intercourse of a married person with a person other than the offender's spouse. Illinois statutes do not define adultery, but they do provide: "The offense of adultery shall be sufficiently proved by circumstances which raise the presumption of cohabitation and unlawful intimacy."

(*Doornbos* v. *Doornbos,* Super. Ct., Cook Co., Ill., December 13, 1954, Gorman, J. [Unreported].)

Insurance Law . . . *water and collisions*

■ When is a collision not a collision? This was the difficult riddle recently solved in the insured's favor by the New York Appellate Division, First Department, in a case involving the comprehensive provision of an automobile insurance policy.

The insured drove his car into a sizeable puddle of water about 40 to 45 miles an hour. The impact apparently damaged the tie-rod, causing the car to swerve to the right, mount a bank, overturn and become demolished.

The insured had only a comprehensive policy, which, of course, excluded collision damage, but provided that "loss caused by . . . water . . . shall not be deemed loss caused by collision. . . ." Here was the crux of the case: The insured said the damage to the car was caused by water, the insurer rejoined that it was caused by the collision of the car with the water.

The Court, with two judges dissenting, held that while it might be conceded that a collision occurred between the automobile and the puddle, the wording of the policy (quoted above) indicated a tacit admission on the part of the insurer that if the collision occurred with

water then the collision exception was in turn so limited.

The dissenters thought that a collision was a collision and thus excluded from coverage. Water damage under the scope of comprehensive coverage, they felt, was something resulting from water in its quality as water.

(*Harris* v. *Allstate Insurance Company*, N.Y. S. Ct., App. Div., 1st Dept., November 23, 1954, Botein, J., 135 N.Y. S. 2d 407.)

Labor Law . . . *suits by unions*

■ The Taft-Hartley Act's provision that a labor union "may sue or be sued as an entity and in behalf of the employees whom it represents" has not made unions "general litigating agencies" in respect of tort claims which individual employees may have against the employer, according to the Court of Appeals for the Second Circuit.

The union's complaint alleged that the workers it represented had suffered lowered wages and poorer working conditions because an official of its international, who had negotiated the collective bargaining contracts for it, had accepted bribes from the employers. The local's action had first requested the total amount claimed as loss of wages for about 400 employes, but its amended complaint asked for the amount of the bribe as a "fund" for the union to distribute to those entitled to it.

The Court ruled that the section of Taft-Hartley permitting a union to sue as an entity was nothing more than a "simple capacity statute" and did not confer new substantive rights, except for violation of contracts. The Court found that the instant action sounded in tort and refused to construe the Act's provisions as a blanket grant of authority to unions to maintain on behalf of their members suits of any character, "whether of tort or contract, and irrespective of the nature of the rights, obligations or duties involved, provided only that the litigation arises in some vague way 'out of the employment relationship.' This would indeed open a Pandora's box. . . ."

The Court declared, moreover, that the action foundered on the question of federal jurisdiction. The Court observed that since the union could not sue for torts on behalf of its membership under Taft-Hartley, there was no federal-question jurisdiction. Thus jurisdiction would have to rest on diversity, requiring the $3,000 amount-in-controversy. Here, the Court noted, the amount claimed by each of the 400 employes was much less than $3,000, and since the employees did not have "a common undivided interest" [*Thomson* v. *Gaskill*, 315 U.S. 442] the individual claims could not be aggregated.

(*Rock Drilling etc. Local Union No. 17* v. *Mason & Hanger Company, Inc.*, C.A. 2d, December 6, 1954, Medina, J.)

Libel and Slander . . . *libel per se*

■ A New York court has held that it is libelous *per se* to charge a professional writer with having written an article that resulted in the publisher of the article settling a libel claim out-of-court for a substantial sum. The Supreme Court of New York County so ruled on a motion to dismiss the complaint.

The plaintiff said he was a professional writer and that his livelihood depended upon his maintaining his "wide and extensive reputation . . . as an accurate and trustful narrator of factual information. . . ." The libelous words complained of were:

> *Life* settled out of court with labor leader Van Arsdale over Chas. Yale Harrison's [the plaintiff's] "Van Arsdale's Tight Little Island" piece of a few seasons ago. Paid him $17,500.

The plaintiff claimed this was a libel per se, but the defendants contended that it was not and that since special damages were not alleged, the action should be dismissed.

The Court agreed with the plaintiff, remarking that it would be a "permissible innuendo" from the words that *Life* was compelled to and did buy its peace because of a wrong done by the plaintiff. The Court stated, too, that the words made a charge "which would naturally tend adversely to affect the plaintiff's standing in his calling". At least, the Court concluded, the complaint should not be dismissed, but the case should go to trial on the matters of innuendo, truth, newsworthiness, privilege and fair comment.

(*Harrison* v. *Winchell et al.*, N.Y. S. Ct., N.Y. County, January 5, 1955, Levy, J.)

Torts . . . *absolute liability*

■ Although urged to do so on public-policy grounds, a California court has refused to adopt a doctrine of absolute liability for airplane owners. In so holding, the California District Court of Appeal, First District, remarked that the "operation of an airplane in the year 1954 is not such a dangerous activity that it can be placed" in the category of extrahazardous activities imposing absolute liability.

The airplane involved was owned by a flying school and loaned to a flying instructor, who in turn allowed it to be used by one of his student pilots. While flying solo, the student ran into trouble, and in attempting to make a forced landing, crashed into the plaintiff's house. The plaintiff was nonsuited in her action against the owners of the flying school.

Since the plaintiff did not prove an agency relationship between the owners of the flying school and the flying instructor, the liability of the owners of the plane, if any, had to rest on the doctrine of absolute liability. The Court made a lengthy analysis of this subject and concluded that California does not consider the operation of aircraft ultrahazardous and does not impose absolute liability on lessors of airplanes.

The Court noted that §§519 and 520 of the *Restatement of Torts*, adopted by the American Law Institute in 1928, declare aviation "in its present state of development"

ultrahazardous. True also, the Court noted, that the Uniform Aeronautics Act, proposed by the Commissioners on Uniform State Laws in 1922 but withdrawn as obsolete in 1943, spelled out a rule of absolute liability as to owners, lessors and operators.

But the Court rejected the *Restatement* view and declared that it was in accord with the modern trend away from the doctrine of absolute liability. The Court was also convinced that absolute liability was not the law of California by the fact that the legislature had in 1947 adopted most of the provisions of the proposed uniform act, but had omitted the section imposing absolute liability, substituting therefore a provision that damages caused by a forced landing should be "as provided by law".

The Court brushed aside a contention that public policy dictated the adoption of an absolute liability rule. That argument should be addressed to the legislature, it said.

(*Boyd* v. *White et al.*, Calif. Dist. Ct. App., 1st Dist., November 12, 1954, Peters, J., 276 P. 2d 92.)

Torts . . . *contribution*

■ The Court of Appeals for the Fourth Circuit has held that under Virginia's statute providing for contribution among joint tortfeasors the insurer of one joint tortfeasor may have contribution not only from the other joint tortfeasor but also from the latter's insurer.

Applying Virginia law, the Court had to go one step further than the state courts had gone. They had interpreted the statute as subrogating the right to contribution to a joint tortfeasor's insurance carrier and had held that when the insurer had paid a judgment on behalf of its insured it was entitled to contribution from the other joint tortfeasor. This case extended the right to the other's insurer.

The Court found ample reason for its ruling in expressions by the Supreme Court of Appeals of Virginia that the state gives liberal application to the principle of subrogation. The Court also felt the decision proper on general equitable grounds.

(*American Employers' Insurance Company* v. *Maryland Casualty Company*, C.A. 4th, December 30, 1954, Soper, J.)

United States . . . *security discharges*

■ A former food and drug inspector has been unsuccessful in the United States District Court for the District of Columbia in his attempt to upset the procedure under which federal employees may be suspended without pay "in the interest of national security".

In upholding the 1950 statute and 1953 executive order involved, the Court commenced its reasoning from the premise that the Executive constitutionally may remove any Executive branch employee at his own discretion. This power, the Court held, has been hobbled only by the Civil Service Act [5 U.S.C.A. §652] and the Veterans' Preference Act, [5 U.S.C.A. §§851 and 863].

In 1950, Congress enacted 5 U.S.C.A. §22-1, providing that "notwithstanding the provisions of . . . any other law" certain department heads could suspend an employee without pay "in his absolute discretion and when deemed necessary in the interest of national security. . . ." In 1953, Executive Order No. 10450 extended the suspension powers to "all other departments and agencies of the Government".

Reviewing these statutes, the Court ruled that the executive order was within the orbit of the 1950 statute, and that the statute in effect withdrew the protection of the Civil Service and Veterans' Preference Acts from an employee whose removal was deemed necessary in the interests of national security. In doing so, the Court rejected an argument that the statute should be construed as applicable only to "security risks" and not to employees charged with disloyalty.

(*Cole* v. *Young et al.*, U.S. D.C. D.C., October 26, 1954, Holtzoff, J., 125 F. Supp. 284.)

What's Happened Since . . .

■ On December 6, 1954, the United States Supreme Court:

DENIED CERTIORARI in *Masters, Inc.* v. *General Electric Company*, 120 N.E. 2d 802 (digested in 40 A.B.A.J. 991; November, 1954), leaving in effect the decision of the Court of Appeals of New York that the McGuire Act, validating non-signer provisions of state fair trade laws, is constitutional.

AFFIRMED [five-to-three with majority opinion by MR. JUSTICE DOUGLAS] *Brown* v. *U.S.*, 209 F. 2d 463 (digested in 40 A.B.A.J. 327; April, 1954), holding that a compensated veteran has an action against the United States under the Federal Tort Claims Act for injuries resulting from negligent application of a tourniquet in a Veterans Administration hospital.

AFFIRMED [unanimously with opinion by MR. JUSTICE FRANKFURTER] *NLRB* v. *Brooks*, 204 F. 2d 899 (digested in 39 A.B.A.J. 829; September, 1953), holding that an employer was guilty of an unfair labor practice under the Labor-Management Relations Act in refusing to bargain with a union which had won a representation election under circumstances where, after the election but before the union was certified, a majority of the employees informed the employer in writing that they did not wish to be represented by the union.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

The author of the following article, formerly Dean of the University of Arkansas Law School and Associate Justice of the Arkansas Supreme Court, is now Professor of Law at New York University. He is an Arkansas Commissioner on Uniform State Laws.

Drafting the Model Post-Mortem Examinations Act

Robert A. Leflar

■ The drafting of the new Model Post-Mortem Examinations Act, promulgated by the National Conference of Commissioners on Uniform State Laws and approved by the House of Delegates of the American Bar Association in August, 1954, is in a measure typical of work done by the Conference in preparing many of its shorter uniform and model acts.

On April 3, 1953, Frances D. Jones, Executive Secretary of the Conference, wrote to seven members of the Conference informing them that they had been named by President Martin J. Dinkelspiel, Commissioner from California, to serve as members of a special committee on a Model Medical Examiners Act. The seven members, all of whom accepted appointment, were Lowry N. Coe of Washington, D.C., Judge John W. Ford, of Youngstown, Ohio, Dean Roger Howell, of the University of Maryland School of Law, Judge John C. Pollock, of Fargo, North Dakota, C. M. A. Rogers, of Mobile, Alabama, Judge George W. Worthen, of Utah, and the author of this memorandum, who served as chairman of the committee. The letter of appointment indicated that the project had been undertaken by the Executive Committee of the Conference after it had been recommended by its subcommittee on scope and program, headed by Walter P. Armstrong, Jr., of Memphis. It also indicated that the undertaking had been suggested by a number of independent agencies, including the National Municipal League, the American Medical Association, the Criminal Law Section of the American Bar Association, the American Judicature Society, the National Civil Service League and the American Academy of Forensic Sciences.

Since none of the Commissioners named to the committee were particularly familiar with the problems of a post-mortem examinations office, our first task was to gain information. All of us knew in a general way that elected coroners are usually not competent to perform autopsies and that the determination of cause of death may be a difficult problem calling for scientific specialization in an exacting area of medical-surgical study, but we lacked the detailed knowledge of the field which would enable us to write a good statute.

Because we knew that the National Municipal League had concerned itself with the problem, we got in touch at once with Richard S. Childs, chairman of the Executive Committee of that organization. He provided us with copies of a pamphlet entitled "A Model State Medico-legal Investigative System", published by the League in 1951 in collaboration with the other groups, named above, which had joined with it in 1953 in asking that the Commissioners on Uniform Laws promulgate an act in the field. Also he aided us in securing copies of the report of an American Medical Association committee, approved by the House of Delegates of that organization in 1945, as well as an analysis prepared in 1947 by Dr. Alan R. Moritz, now head of the Institute of Pathology of the School of Medicine of Western Reserve University, Cleveland, Ohio, and chairman of the American Medical Association Committee on Medico-Legal Problems. We also at Mr. Childs' suggestion secured from Victor Cohn of the *Minneapolis Tribune* a factual summary, prepared by him as a feature series in the *Tribune*, of a large number of cases in which "hidden murders" may have lain forever unrevealed because of the inadequacy of untrained and politically designated coroners as scientific detectors of the physical causes of death. The latter item, though popular in its presentation, gave us not only cogent reasons for the promulgation of a statute such as we were directed to prepare, but also gave us a clearer idea of the type of situations with which the officials who administered the statute would have to deal.

In the meantime we had made a collection of the laws of the forty-eight states dealing with post-mortem examinations.[1] We found that the great majority of the states still relied upon the coroner's office, an office usually filled by election on a county-wide basis, though sometimes by political appointment. Often the office was provided for in the constitution of the state. Maryland since 1939 and Virginia since 1946 had state-wide medical examiner systems which could be regarded as models for the other states, and Rhode Island had recently set up a similar state system. Massachusetts in 1877 had established a medical examiner system which had to varying extents been copied in other New England states, including New Hampshire, Connecticut and Maine. New York City had maintained a central medical examiner's office from 1915 on. Systems limited to particular areas in the state had been set up in New Jersey (two counties) and Wisconsin (Milwaukee). Several other states such as Arkansas (1951) and Georgia (1953) had created central

1. Later in 1953 the National Municipal League issued a mimeographed symposium, "Coroners in 1953", summarizing the relevant laws of thirty-six states.

medical examiner offices headed by trained pathologists as service agencies for the county coroners.

The Maryland authorities sent us a 1948 pamphlet detailing the operation of their system, and Dr. Russell S. Fisher, Chief Medical Examiner in Maryland, provided Dean Howell of our committee, by letters and otherwise, with a great deal of very specific information as to how the Maryland system operated, indicating its defects as well as its strong points. Considerable information was also made available to us from Virginia sources as to the operation of the system in that state, and we received from the Institute of Government of the University of North Carolina a seventy-one-page study of "Coroners in North Carolina" which served somewhat the same purpose, on a more sophisticated level, as the *Minneapolis Tribune* feature series already mentioned. Several recent articles in legal and medical periodicals also afforded valuable background and practical ideas.[2]

At this stage (July, 1953) the chairman of the committee wrote out a first tentative draft of the proposed act and sent copies of it to the members of the committee and several other persons with the request that they study it carefully with a view to meeting together and redrafting it on the eve of the August, 1953, session of the Conference of Commissioners on Uniform State Laws at Boston. All those to whom the draft was sent were asked to attend sessions for the purpose of redrafting the draft on the afternoon and evening of Monday, August 17, first day of the Conference meeting, a time traditionally set aside by the Conference for committee and section work to be done after an opening meeting of the whole Conference in the morning.

When these Monday afternoon and evening sessions were held, they were attended by most of the members of the committee plus several others, both lawyers and medical men, who were concerned with the problem. Among these were Dr. Alan R. Moritz, already mentioned, who was invited in his official capacity as chairman of the American Medical Association's committee on Medico-Legal Problems, Dr. Richard Ford, a member of the same committee who heads the Department of Legal Medicine at Harvard Medical School and is Medical Examiner at Boston, J. W. Holloway, Jr., of Chicago, who is counsel for the American Medical Association committee, Edward L. Wright of Little Rock who was chairman of the Uniform Laws Conference section within which the drafting committee operated, Dr. Carl L. Erhardt of the New York City Medical Examiners Office, and Joe C. Barrett of Jonesboro, Arkansas, then chairman of the Executive Committee and now President of the National Conference of Commissioners on Uniform State Laws. All who attended had already studied the tentative first draft with some care and six or seven of them had previously written to the committee chairman raising questions or suggesting changes for consideration at the meeting.

During the sessions on Monday, all of these suggestions and many others were discussed and analyzed. The pathologists who met with the group, particularly those with long experience as medical examiners, pointed out numerous aspects of the problem that had not occurred to the lawyers. Particularly they were able to analyze the experience of those who administered the state medical examiner systems in Maryland and Virginia, with which some of them were familiar, as well as their own experience in administering the somewhat more specialized systems in New York and Boston. It was readily recognized that a system operating largely or altogether in a metropolitan area presented administrative problems frequently different—sometimes simpler and sometimes more difficult—from those in states where there are many rural counties. On account of this it was quickly agreed that there should be enough leeway left in the administrative provisions of the act to permit it to be adapted to whatever local conditions might exist.

Quick agreement was also reached that for the same reasons the measure should be drawn as a Model Act and not as a Uniform one. The advantages to be gained from uniformity, as with law governing commercial transactions in which parties need to know in advance what the law is and with respect to which differences in law among the states are bound to produce waste and inefficiency, had little bearing on our problem. Our objective was to draft a law that would confer adequate authority upon competent officials and prescribe for them procedures which would enable them to perform their duties effectively in cooperation with other law enforcement agencies, yet with a minimum of inconvenience and disturbance to the sensibilities of family members and the general public. It did not make much difference whether the acts adopted in adjoining states were worded the same or not, so long as the provisions of the acts achieved for each state the main objectives agreed upon. For this the Model Act concept was preferable.

Similarly, it was at once recognized that alternative sections would have to be included in the Act to deal with the traditional office of coroner. All participating in the sessions were agreed that it would be abstractly desirable to eliminate coroners from the governmental picture altogether, on the theory that their office was for practical purposes an obsolete hold over from a long-departed time when no better mode was available for performing its functions. This agreement easily resolved itself into a plan to draft one alternative section to abolish the office of coroner, transfer to the Office of Post-Mortem Exam-

2. *E.g.*, Mann, *Administrative Problems in a State-Wide Medical Examiner System*, 2 PROC. AMER. ACAD. FORENSIC SCIENCE 19 (1952) (Virginia); Beddoe, *Comparative Study of Cases Reported in a State-Wide Medical Examiner System*, 2 PROC. AMER. ACAD. FORENSIC SCIENCE 25 (1952) (New York City and Virginia, compared); Ford, *Medicolegal Investigation*, 145 JOUR. AMER. MED. ASSN. 1027 (1951) (Massachusetts); *Comment*, 1951 WIS. L. REV. 529 (Milwaukee County, Wis.); Taylor, *Scientific Findings on Death*, 20 ROCKY MTN. L. REV. 197 (1948); Smith, *Relation of Law and Medicine*, 23 BOSTON U. L. REV. 143 (1943).

inations all its duties covered by the new Act, and transfer all its other duties to other officials (left blank to fit the local situation). The other alternative, applicable to states where the coroner's office is prescribed and defined by the constitution, was far more difficult. Only a constitutional amendment abolishing the office could fully achieve the accepted objective, but we were required to proceed within a legislative framework which did not include this possibility. Ultimately we settled on a section, possibly unconstitutional in some states, transferring to the new office the duties covered by the new act and leaving to the respective legislatures the task of defining the remaining duties of the indestructible coroners. At the same time we pointed out that each state should consider the possible necessity for redrafting this section to fit its own peculiar constitutional situation.

The afternoon and evening sessions produced a tentative understanding on how the first draft should be redrawn, and during the next day the chairmen of the section and of the drafting committee put it in the form agreed upon and arranged for the "second tentative draft" to be mimeographed in time for consideration by the Conference in the committee of the whole on Wednesday afternoon, August 19. The mimeographed copy was accompanied by a set of "comments" explaining, section by section, why the Act was drawn as it was as well as calling attention to arguable or doubtful matters on which discussion from the floor might aid in deciding how the Act ought finally to be written. The mimeographed copies were placed on the desks in the morning so that all members of the Conference would have a chance to read them before the discussion commenced.

William L. Beers, Connecticut Commissioner and Attorney General of that state, presided as chairman of the committee of the whole before which the act was then presented. Doctor Richard Ford sat with the panel of committee and section members which led the discussion and answered questions about the draft as it was read section by section by the chairman of the special drafting committee. About one hundred separate queries, suggestions or proposals for modifications and additions to the draft were made from the floor during the afternoon. Many of these were accepted by the drafting committee without much argument, a few were voted on by the committee of the whole and either accepted or rejected at the time, still others were discussed at length and then left for further consideration by the special committee. The stenographic report of the proceedings, distributed to members of the committee a month or so later, consisted of fifty-eight mimeographed pages, and a considerable number of minor suggestions, mostly as to phrasing and form, were handed to members of the committee by individual Commissioners.

Preparation of the Act for presentation at the 1954 meeting of the Commissioners at Chicago was the next step. For this purpose the committee wrote a third draft incorporating the changes approved at Boston as well as other suggestions which were deemed useful. During this period the act was studied by several other persons, including Dr. Thomas A. Gonzales, long-time Chief Medical Examiner for the City of New York, and several constructive suggestions received from them were adopted by the committee. The third draft was sent to all those who had actively participated in prior work on the act, with requests that they send their criticisms to the committee chairman and also plan to attend an afternoon session on the opening day of the Chicago meetings (August 9, 1954). This session was held as a meeting of the Conference section to which the drafting committee was assigned, Edward L. Wright, of Little Rock, presiding as chairman of the section. Section members who contributed substantially to the critical analysis of the Act and the problems underlying it, in addition to members of the special committee, included Albert E. Jenner, Jr., of Illinois, James K. Northam, of Indiana, and Charles H. Woods, of Arizona. This meeting produced a fourth draft, though changes were not extensive and it was necessary to remimeograph only two pages of the third draft in order to incorporate them. In the meantime the draft was submitted also to the Conference's Committee on Form and Style, and was thus put in form for a second section-by-section reading and discussion in the committee of the whole later in the week.

The drafting committee was again aided in its presentation to the committee of the whole by the American Medical Association's Committee on Medico-Legal Problems, this time represented by Mr. Holloway, Dr. Moritz and Dr. Ford. Commissioner Jenner, of Illinois, presided.

Many of the major considerations involved in preparation of the act were re-examined, votes were taken on some of them, and several changes in wording were agreed to, but in general there was acceptance of the committee's fourth draft. After some two hours during which the act was analyzed section by section and sentence by sentence, the committee of the whole resolved to recommend its approval by the Conference, subject to the minor changes which had been agreed upon. That night a fifth and final draft was written accordingly, mimeographed, and the next day placed on the desks of all the Commissioners. On Saturday morning, August 14, it was adopted by vote of the states[3] and the following week it was approved by the House of Delegates of the American Bar Association, thus being officially promulgated and available[4] for introduction in the legislatures of the states.

3. By the rules of the Conference, final action on all proposed acts is by a ballot in which each state has one vote regardless of the number of its Commissioners attending the Conference.

4. Printed copies of the Act, with the explanatory comments, may be obtained from Frances D. Jones, Executive Secretary, National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois.

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, John W. Ervin, Chairman; John S. Nolan, Vice Chairman.**

Drafting "Complex" Trusts Under the Five-Year Throwback Provisions of the Internal Revenue Code of 1954

by David R. Roberts

■ The Internal Revenue Code of 1954 has considerably complicated the drafting of complex trusts. In general, a "complex" trust is one which may accumulate income, make charitable contributions, distribute corpus, or invade the corpus for support, education, welfare and the like. The general rule contained in Section 662 (a) of the 1954 Code provides that the beneficiary is taxed on the "distributable net income" of the trust distributed to him. The troublesome exceptions are found in the five-year "throwback" rules set forth in Sections 665-668 inclusive, which tax the beneficiary on "accumulation distributions" of more than $2,000 in excess of "distributable net income" of complex trusts, on a retroactive basis as if the income had been distributed to the beneficiary annually for the preceding five years.

Drafting of complex trusts to operate in the future can become quite difficult if the full income tax consequences of such trusts are to be adequately planned. Draftsmen should consider the effect of the multiple-tier arrangement of the distributable income contained in the new Code, be careful to avoid any unwanted throwback taxes on the beneficiary where the beneficiary may be already in a high income tax bracket, or where the welfare of the beneficiary requires maximum benefit from distributions actually made.

One example of a drafting trap occurs where, as a number of currently used trust forms provide, the accumulated income is to be paid over to beneficiaries who attain specific ages, such as one third of the corpus and accumulated income upon reaching age 21, one half of the remaining corpus and accumulated income upon reaching the age 30, and the remainder upon reaching the age 35. New trusts of this kind are now subject to the five-year throwback rules. The definition of "accumulation distribution" under the 1954 Code is applicable to such trusts not in existence on January 1, 1954. This creates trouble for future use of a familiar and useful kind of trust.

Fortunately, the five-year throwback rules contain a number of express exemptions, not the least of which is a $2,000 annual exemption of current accumulation distributions attributable to any of the five preceding taxable years of the trust. The committee reports and the Code indicate the five preceding years are *post*-1953 taxable years of the trust.

In addition to the exemption of $2,000 from "accumulation distributions", certain specific kinds of distributions are expressly excluded from the amount subject to tax in the hands of the beneficiary. Careful review of these exceptions by the draftsmen at the time the income distribution and accumulation provisions of the trust are being drawn, and again by the trustees during the operation of the trust, may save a number of unsuspected tax liabilities to the beneficiary.

A second situation which the Code expressly excludes from an "accumulation distribution" is where the amounts are properly paid or credited to a beneficiary to meet the "emergency needs" of the beneficiary. The Senate Committee Report states that the exclusion under this provision is limited to an amount which is distributed to a beneficiary to meet his "emergency needs". Whether or not a distribution falls within this paragraph "depends upon the facts and circumstances causing such a distribution". Thus, it is said that a distribution based upon unforeseen or unforeseeable combinations of circumstances requiring immediate help to the beneficiary would qualify. But there is a limitation that the beneficiary must be in "actual need of the distribution". Apparently, the Treasury will be entitled to look at the other resources of the beneficiary to determine whether the distribution was to meet his emergency need. In drafting an emergency-needs clause in a trust for support, maintenance or education of the beneficiary where trustees are authorized to use accumulated income and where the trust does not otherwise provide for distribution under one of the other exceptions contained in the "throwback" rule, the draftsmen might provide the terms and circumstances which will meet the tests of an "emergency distribution", including a review of the beneficiary's other assets. Otherwise, the beneficiary should be warned to expect to pay the extra tax on accumulation distributions.

This raises the question whether a trust which provides for a distribution of accumulated income, either for support, maintenance or education on the one hand, or on the other hand for "emergency needs" which do not comply with the requirements of the Code and regulations for exemption as an "accumulation distribution" could specify that the distribution include an amount *out of corpus* equivalent to the extra tax which would necessarily be paid by the recipient beneficiary by virtue of the "accumulation distribution". The purpose of such a provision would be to relieve the beneficiary

of the tax burden and yet make available the accumulated income in excess of $2,000 which had been accumulated during the past five years.

There are available at least three *exceptions based upon time* which a draftsman can consider in minimizing the effect of application of the five-year throwback rule. The first of these is to commence payment from the accumulation during the sixth year out of amounts accumulated during the first year. Thus, succeeding years' distributions would be made only from income from the year prior to the five-year accumulation throwback provided for in the Code. The trouble with this approach is that (1) it is a rather inflexible limitation upon distribution; (2) Congress may see fit to change the period during which the income may be thrown back; and (3) the Code contains an unstated assumption that every excess distribution is out of the most recently accumulated income. Whether this assumption can be overcome by draftsmanship remains to be seen.

Distributions of income accumulated before the birth of a beneficiary or before a beneficiary attains the age of 21 are also specifically excluded from the taxable category. Thus, accumulations for unborn children or grandchildren or to be paid out during minority are given a favored position. The Senate Committee report indicates an intent that the age of 21 was specified to avoid relying on the variation in state law as to rules of different ages at which individuals reach majority. However, it seems necessary that draftsmen continue the usual policy of carefully examining the applicable state law as to accumulations for unborn children or grandchildren; especially where there are reversionary possibilities in the case of a living trust.

A rather interesting relationship between the provision for "Clifford" trusts (in excess of ten years) Section 673 (a), and the throwback rule exclusions has been included. Final distributions by a trust paid or credited to a beneficiary are not part of an "accumulation distribution" if the final distribution is made more than nine years after the date of the last "transfer to such trust". Thus, a settlor of a living trust might establish a short-term trust which was to last for more than ten years with a provision for accumulation of the income or payment over of a certain amount to beneficiaries and accumulations of the balance. At the end of the tenth year, the trust would terminate and the undistributed accumulated income might return to the settlor, taxed only at the trust rates, without application of the five-year throwback provisions. However, it should be observed that no further transfers could take place to the corpus of such a trust during the nine years prior to the final distribution. Under prior decisions, the establishment of such a trust would be quite dangerous. In view of the restrictions in Section 677 that the settlor must be required to secure approval or consent of an adverse party and cannot secure the income by virtue of an act of his own discretion or in the discretion of a non-adverse party, or both, the settlor's control must be closely limited in the instrument. A person having a general power of appointment is an "adverse party". But the general rule of Section 167 of the 1939 Code seems still present, namely, that income which is or may be paid to or accumulated for the settlor is taxable to him. Such a deferred accumulation situation is not expressly prohibited in the new Code, unless the word "beneficiary" is construed to exclude a settlor in the throwback exception.

The short-term reversionary trust now may be a more useful method of providing income for beneficiaries, plus income accumulation, with a transfer of the accumulation at the end of the term (in excess of ten years) without taxation at a beneficiary's rate on the accumulation. In view of the correlation of the throwback rules with the short-term trust provisions of the 1954 Code, some caution should be used in relying on this for income-splitting in view of the attacks to which the short-term trust provisions of the new Code have been subjected since their enactment. But it is entirely possible that the final distribution exemption provisions in the undistributed accumulation rules may survive, even though the short-term trust provisions are changed or repealed. Thus, at least the final distributions of accumulated income to a trust beneficiary where the trust has been in existence for a period of more than nine years after the date of the last transfer to the trust have a preferred position under the new Code.

David R. Roberts

Does a provision in a trust instrument that the prior years' accumulated income is to be transferred into and become part of corpus, constitute a transfer to the trust within the "last transfer to such trust" clause in Section 665 (b) (4)? The Senate Committee report gives little indication of the answer to this question except that the nine-year period is there to prevent the establishment of "collapsible" trusts to avoid the accumulation distribution rules. In the House Bill, Section 663 (b) (1) provided that any amount paid or credited as a final distribution would be excluded from the provisions of the throwback rules except to the extent it consisted of gross income of the trust for the taxable year. The Senate appeared simply to be preventing the use of short-term trusts of less

than ten years to evade the throwback rules, rather than to be placing any further limitations upon what kind of trusts and transfers to trusts qualify.

From the draftsman's point of view, weaknesses of the throwback rules in the 1954 Code exist in the relatively inflexible income dispositions which should be provided to stay within the exceptions. These dispositions may not, in many instances, conform to the desires of the testator or settlor, or particularly the needs of the beneficiary. And it is often dangerous to base dispositive or income payment provisions of trusts which are to have a long duration upon tax laws subject to change or substantial modification. Such reasoning leads to thinking that the income distribution provisions of complex trusts, particularly as to the use of accumulated income—or the decision to accumulate income at all—should be drafted so the trustees are given considerable discretion in the trust instrument.

Corporate and other trustees of new trusts, as well as of existing trusts, should carefully consider the income tax consequences to the beneficiaries of the income distribution provisions, where accumulated income is involved or may be involved. The beneficiary may have unsuspected tax liability thrust upon him by incomplete consideration of the alternatives. The trustee may be opening up a Pandora's box of tax accounting problems, particularly if it is closely connected with the beneficiary's personal affairs.

While the five-year throwback provision can only be tested by the passage of time, there is no doubt that it is an innovation which has difficult implications for the trust draftsman and for the trustee. On the one hand, relatively inflexible exceptions are available for the ingenious; on the other hand, where flexibility is desired, the responsibility of the trustee for pre-accumulation and pre-distribution income tax planning may be materially increased.

Views of Our Readers

(Continued from page 206)

cries, and to that there is no answer except that all men are liars and what is only seems to be because political necessity demands that the "truth" serve the cause.

It is clear that the Senator from Wisconsin and his die-hard followers find it psychologically impossible to believe that anti-communism of a kind that does not agree with their own is genuine. I, too, am against communism in America, but I respect our Constitution and cherish Voltaire's immortal statement: "I may disagree with what you say, but I will defend to the death your right to say it".

Senator McCarthy reminds me of Don Quixote fighting windmills, because although he was trying to do an admirable service—stamping out Communism in America—nevertheless, he adopted atrocious methods formerly used by history's leading Fascists who were primarily motivated by selfish personal aggrandizement. If McCarthy had been allowed to gallop unchecked, he could have easily precipitated "thought control" Fascist dictatorship in America. Such a tragedy would have made a mockery of our Constitution and Bill of Rights and reduced this nation to the sewer level of a totalitarian dictatorship!

Senator McCarthy is a man of considerable ability, bordering on genius. Therefore, I sincerely trust that he will conquer his juvenile desire for misleading sensational headline hunting and character assassination via the treacherous innuendo route and harness his tremendous energies and talents into constructive channels to combat Communism. For example, Senator McCarthy should make it clear that America can win future converts to capitalism only in direct proportion to our ability to produce results—not mere lip service—as to how the over-exploited, hungry and poverty-stricken people of the world can raise their standards of living. The "problem", Senator McCarthy should point out, is not *ipso facto* Communism but hunger and poverty which curse more than half the world and which would remain whether we won or lost World War III. Therefore, it is obvious that another world war is not the solution, because hungry people don't give a hoot whether the loaf of bread is branded with the Hammer and Sickle or our Stars and Stripes!

Thomas Jefferson said: "Error of opinion can be tolerated so long as reason is left free to combat it". It is axiomatic that it is only through the exchange of conflicting opinions that the sparks of wisdom fly! This sacred principle has built this nation into the most powerful country in the world, blessing our people with the highest standard of living in recorded history!

JOHN SATO

Ravenna, Ohio

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe • Editor-in-Charge

ANTITRUST: By bitter experience at Madison, Wisconsin, and Washington, D. C., yesterday and in New York today, the oil companies have learned that doing what your Government wants frequently results in government prosecution. No industry today that "co-operates" with another industry in a way that can be regarded as a violation of the antitrust laws is safe from subsequent prosecution, if we judge the future from the past. Of course, this should not be so and the Defense Production Act of 1950, recently renewed for another two years, authorizes our President to approve certain such voluntary agreements of co-operation in the national interest and grant an exemption from later prosecution under our antitrust laws. Harold L. Schliz, Attorney Adviser in the General Counsel Office of the National Production Authority from 1951 to 1953, tells us all about some fifty-five voluntary agreements put into effect under the Defense Production Act and an additional twenty-six defense production pools of small business corporations in the January, 1954, issue of the *Virginia Law Review* ("Voluntary Industry Agreements Their Exemption from the Antitrust Laws", Vol. 40, No. 1, pages 1-21; address: Charlottesville, Va., price for a single copy: $1.50). Schliz says on the authority of the article by John Lord O'Brian and Manley Fleischman (13 *George Washington Law Review* 1-56 (1944) entitled "The War Production Board Administrative Policies and Procedures") that "thus far" no instance has been brought to their attention where participants to World War II voluntary agreements went beyond the scope of the plan as approved by the Government. Mr. Schliz says "There has been a dearth of litigation of a prosecutive nature growing out of government-sponsored voluntary agreements and programs since the time of attacks upon actions originating in National Industrial Recovery Act days." And he speculates as to what will happen when and if such litigation develops because the committee minutes are so important and yet many parts of them must be "under restrictive security protection". This is an interesting and valuable paper on a subject important to American business, large and small.

BANKRUPTCY: Curtis W. Post, the Editor of the *Commercial Law Journal*, a publication of the Commercial Law League of America, pays the compliment in its July, 1954, issue of reprinting the excellent article of John E. Mulder, of the Philadelphia Bar, first published in the *Temple Law Quarterly*. Mulder takes up those two old friends of us bankrupts, *Isaac* v. *Hobbs*, 282 U.S. 734, and *Straton* v. *New*, 283 U.S. 318. He gives an outstanding analysis of the two. Perhaps, I like it so well because I never thought *Straton* v. *New* meant what it said or was a wise decision when a bankrupt has a big equity in real estate that is being foreclosed. In such circumstances the fact that the mortgagee had a judgment beyond the four months period seems quite immaterial. Let the trustee take over and pay it off. Analyzing the recent cases (*Murphy* v. *Bankers Commercial Corp.*, 203 F. 2d 645, Second Circuit, 1953; *Central Pennsylvania Equipment*, 58 F. 2d 349, M.D.Pa. 1932; *In re Hornstein*, 122 F. 2d 266, Second Circuit, 1941; and, *In re Lustron*, 184 F. 2d 789, 7th Cir. 1950) Mulder concludes:

> The machinery of the Bankruptcy Act is designed to produce as much by way of dividends for general creditors as possible. The conclusion is that in the future, courts, should so interpret *Straton* v. *New* as to permit a restraining order in circumstances where such irreparable injury is shown to exist. If this is not possible or practicable, the Bankruptcy Act should be amended to expand the power of the Trustee and the Bankruptcy Court to grant an injunction in such cases.

The title of Mulder's piece is: "Limits of the Powers of Trustees in Bankruptcy". For a copy write: Commercial Law League of America, 111 West Monroe Street, Chicago, 3, Illinois, and send 50 cents for Volume 59, pages 185-192; or write Temple Law Review, 715 North Broad Street, Philadelphia, Pennsylvania, ask for Volume 27, pages 291-308, and send $2.00.

EVIDENCE: In New York there is an old horse car case where the driver climbs out after a crash and some five minutes later tells a cop that the brakes were bad. It was shocking to me to find out that such a statement is incompetent and I was always equally shocked at the many similar cases. My recollection is that Wigmore spent pages showing how the Latin phrase *"res gestae"* was a coat of many colors and a poor substitute for reason, because as used it covers not only the horse car case but some fourteen other situations. Eddie Morgan once assayed a classification of *res gestae*, brave man that he is ("A Suggested Classification of Utterances Admissible as Res Gestae", 31 *Yale Law Journal* 229). G. D. Nokes, in the July, 1954, *Law Quarterly Review* tells us that the English also have many meanings for *res gestae* and in a piece titled *"Res Gestae* as Hearsay" attempts to classify the various meanings. G. D. Nokes was prompted to write his article because the "Final Report of the Committee on Supreme Court Practice and Procedure" known as the "Evershed

Committee" in order to reduce "the length of oral evidence" and "the expense of a trial" expressed the hope that English judges will give "a liberal interpretation of the rule of evidence known as res gestae". Specific reference is made by the Evershed Committee to "statements overheard" by third parties in personal injury actions. Nokes states "The confusion which surrounds [*res gestae*] is partly due to its indiscriminate use in judgments and legal literature, where the words *res gestae* have been used to describe at least seven different situations." Nokes quite properly points out that if the suggestion of the Evershed Committee is to be adopted, "a necessary preface is an attempt to delineate the present boundaries of oral res gestae". The only one I ever knew that could define with beauty and precision the meaning of *res gestae* was a favorite old salt of mine, Captain B. W. Chippendale of the U.S. Navy, who now languishes in retirement in a cabana at Virginia Beach. I wish I had the captain's lecture recorded. It would be a valuable appendix to this study and give new meanings to *res gestae* which Morgan, Wigmore and Nokes have never known. But I suppose when the new hornbook on evidence, just now written by Charles McCormick and published by the West Company, comes to hand all American meanings will be established. McCormick from Texas usually hits the bull's-eye. It is good, however, to have this study of G. D. Nokes, which discusses so many of the leading cases so well known to all of us from our student days. To the teacher and the practitioner this article ought to be of great value in giving current analysis and ready reference to cases in England dealing with "res gestae" which as I recall Captain Chippendale located for his class some place in the Sargasso Sea. How right the Captain was! *Res gestae* lies right in the middle with the barnacles. (For this article write to Carswell Company, Ltd., Toronto, Canada, ask for Volume 70, pages 370-389, and send $2.00.)

LIMITATIONS: Readers of this column are familiar with *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514. "Cheek Wells was killed in Alabama when a grinding wheel with which he was working burst. The wheel had been manufactured by . . . Simonds Abrasive Co., a corporation with its principal place of business in Pennsylvania. The plaintiff, the administratrix of Cheek Wells, brought an action for damages in the Federal Court for the Eastern District of Pennsylvania after one year, but within two years after the death of Cheek Wells, jurisdiction being based on diversity of citizenship. The section of the Alabama Code upon which the plaintiff predicated her action for wrongful death provided that suit 'must be brought within two years from and after the death . . .'. The . . . Simonds Abrasive Co. moved for summary judgment on the ground that the Pennsylvania wrongful death statute required suit to be brought within one year. The District Judge ruled that the Pennsylvania statute which was analogous to the Alabama statute, had a one-year limitation and that the Pennsylvania conflict of laws rule called for the application of its own limitation rather than that of the place of the injury and, deeming himself bound by the Pennsylvania conflicts rule ordered summary judgment for the [Simonds Abrasive Co.]. The Court of Appeals for the Third Circuit (195 F. 2d 814) affirmed." And as we know by a sharply divided Court, the Supreme Court affirmed. The late Mr. Justice Robert Jackson wrote magnificently in dissent as those of us (38 *Virginia Law Review* 569; 7 *Vanderbilt Law Review* 636) who have studied *First National Bank of Chicago* v. *United Air Lines*, 342 U.S. 396, and *Hughes* v. *Fetter*, 341 U.S. 609, were bold enough to predict he would when the point came for decision. Vinson wrote for the majority and Clark did not sit. Only Justices Black and Minton agreed with Jackson, J. If and when the point comes again, its disposition will depend upon the votes of Chief Justice Warren and Justices Clark and Harlan, assuming the latter's confirmation. Interestingly enough the present term has seen an important switch. It was the position of Chief Judge Charles Clark in dissent at the Circuit in *United States* v. *Sacher*, 343 U.S. 1, that Judge Medina should have cited Sacher for contempt before another Judge. Clark's position there to a degree has been vindicated in *Offutt* v. *U.S.A.* (November 8, 1954, 23 U.S. Law Week 4003) where over the dissent of Reed, Minton and Burton, JJ., Judge Alexander Holtzoff was directed to cite *Offutt* for contempt before another Judge. Discussing his own dissent in the Harrison Williams case (*Austrian* v. *Williams*, 198 F. 2d 697) Chief Judge Charles Clark recently (21 *University of Chicago Law Review* 24) reiterated the argument of the late Mr. Justice Robert Jackson in *Wells* v. *Abrasive, supra*. We all know that in practice the statute of limitations is extremely important and if the Supreme Court tips over the rule of *Wells* v. *Simonds Abrasive*, its effect will be nationwide. The point is as much a state as a federal one under the full faith and credit rules. This is why the study of the *Wells* case in two installments in the two current copies of the *Washington and Lee Law Review* is so worthwhile. Curiously enough the piece began in Vol. 11, No. 1 of the 1954 *Washington and Lee Law Review* under the title "The Full Faith and Credit Clause as Related to the Diversity Clause in Statute of Limitations Cases" as a "Note" written by Professor James W. H. Stewart of Washington and Lee Law School with Lawrence C. Musgrove, a member of the school's law review. As they say there the case of *Wells* v. *Simonds Abrasive* presents these three problems:

> 1. Which limitation period would the Pennsylvania state courts have applied? 2. If the Pennsylvania state courts would have applied the forum state's limitation period, would this application be a denial of full faith and credit to the public acts of the

lex loci? 3. Must a federal court, when jurisdiction is based on diversity of citizenship, act as a mirror of the state courts where it sits in every instance?

Professor Stewart and Mr. Musgrove say that the Supreme Court in granting certiorari in the *Wells* case "limited consideration to the second of the above problems—that is whether the Pennsylvania conflicts rule calling for the application of its own limitation period violates the Full Faith and Credit Clause of the Federal Constitution". The conclusion of Messrs. Stewart and Musgrove is that "the majority in the *Wells* case has allowed the cause of action which accrued in Alabama all the recognition it is historically entitled to under the Full Faith and Credit Clause." The second installment which I found the more profitable, is published by Professor James W. H. Stewart, alone as a leading article, instead of a note, in Vol. II, No. 2 of the *Washington and Lee Law Review* for 1954. The title is intriguing, "The Federal 'Door-Closing' Doctrine", and the author reaches the conclusion with which I heartily agree "there is nothing in the history of the Constitutional Convention to indicate that asylum from suit was sought—but otherwise", and he deplores this aspect of *Griffin* v. *McCroach*, 313 U.S. 498, *Angel* v. *Bullington*, 330 U.S. 183, and *Wells* v. *Simonds Abrasive*. Carefully reading and re-reading both pieces, I had some doubt that the conclusions in piece number two jibe entirely with piece number one. My study was rewarding and our debt to Professor Stewart is great because chances are good that the Supreme Court will have this point up for decision again soon. (Write Washington and Lee Law Review at Lexington, Virginia, and send $2.00 for both these issues; the piece by Judge Medina on Procedural Reform is also in Vol. II, issue No. 2 for 1954, so you get that along with Professor Stewart's valuable study).

MILITARY JUSTICE: There is an excellent article that I missed in the June, 1953, issue of the *Fordham Law Review* by Professor and Assistant Dean Harold F. McNiece of St. John's Law School and Professor John V. Thornton of New York University Law School. Paraphrasing their message I would say, it goes this way:

When the Japanese attacked Pearl Harbor the Articles which governed the United States Navy were substantially the same as Cromwell's Articles of 1649 and the Army was ruled by a statute which still bore the marks of an ancient Roman predecessor. Today the American system of military justice, while still far from perfect, has been much improved by the enactment of the Uniform Code of Military Justice, which provides greater safeguards for accused persons and establishes a Court of Military Appeals as the highest tribunal within the court-martial system. The Court of Military Appeals has done a good job. It has established the concept of "military due process" which is designed to safeguard the basic right of an accused to a fair trial. However, formidable defects still exist in the military legal system, including "command control". The commanding officer still appoints the members of the court, the trial counsel (prosecutor), and the defense counsel, and reviews the findings and sentence. Moreover, entirely separate offices of the Judge Advocate General for each service have been retained under the new system with no significant movement towards unification. Judicial review by civilian courts of court-martial convictions via the habeas corpus route is still possible under the new Code. However, the civilian courts unfortunately have refused to apply the same standards as in civilian cases with the result that a serviceman is seldom successful in a habeas corpus proceeding.

Those of us interested in military justice must have this piece in our file as it is exceptionally well done as everything by these two old friends and collaborators always is, whether you agree with their viewpoints or not.

The article is entitled "Military Law from Pearl Harbor to Korea" and appears in 22 *Fordham Law Law Review* (No. 2; pages 155-182). (Address: Fordham Law Review, 302 Broadway, New York 7, New York; price for a single copy: 75 cents.)

TRAFFIC COURT CONFERENCES

University of Mississippi	Oxford, Mississippi	February 28-March 2
University of Florida	Gainesville, Florida	March 3-5
Northeastern University	Boston, Massachusetts	March 7-11
University of Oklahoma	Norman, Oklahoma	March 31-April 2
Michigan State College	East Lansing, Michigan	April 5-7
Arizona Conference	Phoenix, Arizona	April 12-13
University of Kansas	Lawrence, Kansas	April 26-28
Tulane University	New Orleans, Louisiana	May 2-6
University of Georgia	Athens, Georgia	May 11-13
University of Illinois	Urbana, Illinois	May 23-25
Ohio State University	Columbus, Ohio	June 1-3
New York University	New York, New York	June 13-15

Activities of Sections

SECTION OF ADMINISTRATIVE LAW

■ The Section of Administrative Law deals so much with current matters that a report of its principal activities is likely to be outdated by the time of publication. This is especially true of a report written in the first weeks of a new session of the Congress, to be published in the third month of that session.

The primary immediate activity of the Section has been in pursuance of a resolution adopted by the House of Delegates at the 1954 Annual Meeting (quoted at page 871 of the October issue of the JOURNAL) advocating that any legislation to authorize the impounding of mail in the course of fraud, lottery and obscenity proceedings before the Postmaster General should authorize such impounding only on prior application by the Postmaster General to a United States District Court, on notice to the person affected. The resolution thus in effect opposed the enactment of legislation in the form of H.R. 569, 83d Cong., which would have authorized impounding by action of the Postmaster General himself, with provision for subsequent application by the person affected for judicial relief. The resolution adopted by the House had been proposed to it by this Section and the Section of Criminal Law.

Following the Annual Meeting, the President of the Association designated the Section of Administrative Law to represent the Association with respect to legislation on this subject. We are glad to report that on January 6 Senator Carlson, who had been Chairman of the Senate Committee on Post Office and Civil Service in the 83d Congress, introduced a bill, S. 8, which proceeds generally along the lines advocated by the resolution of the House of Delegates. We have been, before and after that event, in communication with the Senate Committee on Post Office and Civil Service and the like Committee of the House of Representatives. At this writing no report is possible on the status of such legislation in the House.

Pursuant to the general authority conferred on the Section under a 1950 resolution of the House of Delegates to "preserve the gains made by the adoption of the Administrative Procedure Act", we have communicated with the White House Office and the Bureau of the Budget regarding a proposed Executive Order for reconstituting the Air Coordinating Committee. We have advocated inclusion in any such order of provisions to the effect that no action or recommendation of the Air Coordinating Committee shall operate to deprive interested persons of due notice or other procedural rights under the Administrative Procedure Act, and that no agency in matters subject to the Administrative Procedure Act shall predicate any rule, decision or action upon a recommendation or action of the Committee except to the extent that due notice thereof is included in the notice of proposed rule-making or in the issues of a case adjudication proceeding.

Through appropriate committees, the Section is engaged in detailed study of the final recommendations of the President's Conference on Administrative Procedure, which held its concluding plenary sessions on October 14-15 and November 8-9, 1954. Articles in the December issue of the Section's *Administrative Law Bulletin* report textually the resolutions of the Conference on the subject of federal hearing examiners and on the subject of the feasibility and desirability of uniform rules of federal administrative procedure, and a final resolution of the Conference recommending to the President that he constitute upon a permanent basis a conference similarly organized and operated. We regret that the Conference resolution on hearing examiners advocated continued administration by the Civil Service Commission (with the establishment of a new Bureau of Hearing Examiner Administration), a position contrary to that adopted by the House of Delegates on recommendation of the Section at the 1954 Midyear Meeting. But the Conference accomplished much that was useful; and the Section, having had a good to do with its original formation and having taken some part in its activities, welcomes the suggestion that something of the same kind be continued permanently.

The Section is awaiting with particular interest the recommendations of the Hoover Commission, especially those proposed by its Task Force on Legal Services and Procedure. These also will be made the subject of immediate study by the appropriate Section committees.

SECTION OF ANTITRUST LAW

■ The Antitrust Section is planning a comprehensive discussion of the problems of trade associations at its 1955 Spring Meeting to be held March 31 and April 1 at the Hotel Statler in Washington. Following a reception and dinner on March 31, an all-day symposium on April 1 will cover two areas of trade association problems. One will deal with general subjects, such as: (1) When a trade association should be formed weighing the antitrust problems created as compared to benefits derived by members. (2) If it is to be formed, should it be open to all comers or should the right of selection of members be retained? (3) Whether mem-

bership should be on a vertical basis, including manufacturers, dealers, etc., or on a horizontal basis, limited to one category? (4) Whether voting powers and office-holding should be arranged so as to guarantee representation by small business on boards and committees. (5) The administrative problems of trade association executives. (6) The policing problems of lawyers representing associations and the individual members.

The other broad area to be dealt with is to cover specific subjects of major importance such as: (1) product and marketing research, (2) standardization and simplification, (3) statistics, (4) public relations, including industry advertising, governmental advisory committees and legislative activities. The program is intended to be of interest both to [illegible] for trade associations and [illegible] for individual members.

SECTION OF CRIMINAL LAW

■ With the convening of the 84th Congress the Section of Criminal Law has renewed its activities in support of several federal legislative proposals approved by the Association. These include a measure to extend the federal conspiracy law so as to include conspiracies violating certain state laws when the conspirators make use of interstate commerce; improving amendments to the Federal Lottery Act and the Federal Slot Machine Act; amendment permitting the Government to appeal from orders suppressing evidence in the initial stages of criminal prosecutions; and new legislation to deal with the transmission of gambling information in connection with interstate bookmaking syndicates. (The most important Section-sponsored bill in the 83d Congress, the so-called immunity law, was enacted.)

The Section is still studying the subject of wiretapping and possible legislation in connection therewith, though no agreement enabling any vigorous course of action is in sight.

Also under consideration are proposals for a reexamination of the Harrison Act and federal policies *vis-à-vis* the traffic in narcotic drugs and new legislation directed at the impounding powers of the Postmaster General.

Members of the Association are invited to comment on any of the foregoing subjects and to make suggestions as to other problems which might merit attention from the Section. With several major studies of criminal jurisprudence under way, the Section is in the happy position of serving as a liason with some of the best research talent and facilities that have ever been concentrated in this field.

SECTION OF MUNICIPAL LAW

■ The Section of Municipal Law has completed committee assignments. An early issue of the Service Letter will list the committee membership. The growing volume of work in all branches of public works construction presents practical problems for committee work of immediate value and service. The Section is making full use of its liaison committees with other professional groups to cooperate in seeking the answers to difficult questions running all the way from multi-million dollar toll highway financing to zoning, property condemnation, parking facilities and sewer and water works. In the close cooperation necessary for financing municipal undertakings on all levels of government, national, state and local, liaison has been maintained with the Investment Bankers Association of America. Common problems involving new and remedial legislation have been discussed.

Chairman David M. Wood and Section Delegate to the House of Delegates, Harold S. Shefelman, attended a meeting of the Investment Bankers Association in Florida last November, in response to invitations.

The report of the joint committee on parking is well advanced toward publication and requests for copies have already been received. The final report to be published and distributed is made possible through the generous cooperation of the Eno Foundation headed by Colonel Robert Goetz.

The Third Annual Miami Insurance Law Conference and the Florida Bar Pre-Convention Legal Institutes will be held at the Roney Plaza Hotel in Miami Beach on Monday, March 28, through Wednesday, March 30.

Sponsored by the University of Miami, the Insurance Conference will be held on Monday and Tuesday. There will be eight institutes during the three-day period, covering the subjects of criminal law; domestic relations; taxation; medical jurisprudence; food, drug and cosmetic law; tort claims; judicial reform; and military law. Among the speakers will be William A. Sutherland, of Washington, D. C., Charles Wesley Dunn, President of the Food Law Institute, Wesley A. Sturges, Dean Emeritus of the Yale Law School, Shelden D. Elliott, Professor of Law at New York University, and Thurman Arnold, former Assistant Attorney General of the United States.

BAR ACTIVITIES

Paul B. DeWitt · Editor-in-Charge

■ The final rounds of the Fifth Annual National Moot Court Competition, sponsored by the Young Lawyers Committee of The Association of the Bar of the City of New York, Harman Hawkins, Chairman, were held at the House of the Association on December 16 and 17, 1954. The law schools competing in the final rounds had been successful in the regional rounds of arguments held in more than eighty law schools throughout the United States. The participating schools were Boston University School of Law, Columbia University School of Law, Emory University Lamar School of Law, Georgetown University Law School, Loyola University of Los Angeles School of Law, Southern Methodist University School of Law, University of Buffalo School of Law, University of Chicago Law School, University of Colorado School of Law, University of Florida College of Law, University of Illinois College of Law, University of Kentucky College of Law, University of Michigan Law School, University of Pittsburgh School of Law, University of South Carolina School of Law, University of Texas School of Law, Villanova University School of Law, Washington and Lee University School of Law, Washington University School of Law, Western Reserve University School of Law and Willamette University College of Law.

The two teams reaching the finals were those from Columbia and Illinois. Columbia was represented by Richard E. Leavitt, J. Daniel Mahoney and David T. McGovern. Illinois was represented by Jack W. Leskera and Willard L. Shonfeld.

Columbia was designated the winner of the competition and was awarded the right to possession of a silver cup named for Chief Judge John C. Knox of the United States District Court for the Southern District of New York, and a prize of five hundred dollars named for Major General William J. Donovan, war-time head of the Office of Strategic Services. The University of Colorado team was judged to have submitted the best brief entitling its school to possession of a silver bowl named for Harrison Tweed. David T. McGovern, of Columbia, was adjudged to have made the best individual oral argument and won a set of law books.

The court for the final argument consisted of Felix Frankfurter, Associate Justice of the Supreme Court of the United States, Edmund H. Lewis, Chief Judge of the New York State Court of Appeals, Ernest A. Inglis, Chief Justice of the Connecticut Supreme Court of Errors, Charles D. Breitel, Justice of the Appellate Division, First Department, William H. Davis, Chairman of the Atomic Energy Labor Relations Panel, Thomas K. Finletter, Former Secretary of the Air Force, and the President of The Association of the Bar of the City of New York, Allen T. Klots.

■ Stemming from a request by the Pennsylvania Newspaper Publishers Association, a joint Committee was set up in January by J. Campbell Brandon, of Butler, President of the Pennsylvania Bar Association, and I. Z. Buckwalter, of Lancaster, President of the Pennsylvania Newspaper Association, to study "the whole concept of Freedom of the Press and Fair Trial". The request of the Publishers' Association was prompted by the questions raised by the Westmoreland news-picture-ban case in which the Westmoreland county court ruled that photographers should not be permitted to take pictures in the courthouse and its environs.

The Chairman of the Committee is Fred B. Trescher, Greensburg attorney and former Westmoreland County judge. The other members are William S. Bailey, Harrisburg attorney; Desmond J. McTighe, Morristown, Chairman of the Pennsylvania Bar Association's Public Relations Committee; Paul A. Mueller, Lancaster, Vice President of the Pennsylvania Bar Association; Hugh J. McMenamin, Scranton attorney and member of the State Senate from Lackawanna County; Robert S. Bates, editor and co-publisher of the *Meadeville Tribune-Republican* and past president of Pennsylvania Newspaper Publishers Association; Harry R. Pore, Jr., co-publisher of the *Monessen Independent* and a member of Pennsylvania Newspaper Publishers Association's executive committee; John H. Carter, editor of the *Lancaster New Era;* Walter Lister, managing editor of the *Philadelphia Bulletin;* and Andrew Bernhard, editor of the *Pittsburgh Post-Gazette.*

A few weeks before the Westmoreland County ruling reopened the question, the subject "A Free Press v. A Fair Trial" had been debated at the Midwinter Meeting of the Pennsylvania Bar Association in Harrisburg. At that time cooperative study of the problem by newspapermen and attorneys was urged by both principals in the debate, Edwin M. Otterbourg, former President of the New York County Lawyers Association, and John M. McCullough, former staff writer for the *Philadelphia Inquirer.*

■ The Massachusetts Bar Association, in connection with the Massachusetts Heritage Program, prepared a pamphlet which tells the story of Massachusetts in reproductions of the famous "Milestones on the Road to Freedom" paintings in the State House. There is a concise accompanying text. The pamphlet was distributed to every library, every public, private and parochial high school in Massachusetts and 50,000 copies have been printed for distribution to

every high school senior in Massachusetts.

The program was inaugurated at a dinner of the Association in November at which the Lieutenant Governor and the Chief Justice of the Massachusetts Supreme Judicial Court spoke.

■ The Southwestern Legal Foundation held its Sixth Annual Institute on the Law of Oil and Gas and Taxation in January. In February the Foundation sponsored an Institute on Real Estate Appraisal and in March will sponsor an Institute on Labor Law.

The Fifth Annual Lawyers Week will be held in April.

Wesley W. WERTZ

■ Wesley W. Wertz, of Helena, was elected President of the Montana Bar Association at the annual meeting held July 22-24 at Billings and took office October 1. John C. Sheehy, of Billings, was renamed to the office of Secretary-Treasurer. Russell E. Smith, of Missoula, was designated President-nominee.

A special guest of the meeting was William J. Jameson, President, 1953-1954, of the American Bar Association, who was honored by his fellow lawyers of Montana by this meeting in his home town. Other highlights of the convention were the Minnesota Civil Jury Trial Panel and addresses by Earl A. Brown, of Dallas, relating to oil and gas, and by Adlore R. Kehoe, of Seattle, concerning the lawyer and tax law. William W. Gibson, of St. Paul, past President of the Minnesota Bar Association, spoke at the Junior Bar Breakfast on "Public Relations and the Practice of Law".

■ The Pima (Arizona) County Bar Association has recently published a pamphlet entitled "So You Are Going To Be a Witness". The pamphlet explains in detail to the prospective witness the conduct of a trial and indicates what he should expect and how he should conduct himself in court. The Sheriff of Pima County will distribute a copy of this pamphlet with each subpoena served by his office upon a witness.

The Pima County Bar Association also is sponsoring a television program in which a panel of members of the Association analyze legal questions propounded by the viewing audience.

■ Tax planning under the 1954 Internal Revenue Code was the subject of the short course for Illinois lawyers conducted by the College of Law of the University of Illinois. Such topics as organization and operation of partnerships, effective use of trusts, and tax-wise investments were discussed.

■ The second annual script-writing contest sponsored by the Committee on American Principles of the Queens (New York) County Bar Association, just had a successful conclusion when the winning script was televised by WRCA-TV in November.

The script was entitled, "Mission to Mexico" and was written by Dave Toor, a student at Brooklyn College. This script was selected from among scripts submitted by students of the institutions of higher learning located within the City of New York and the Counties of Nassau and Suffolk. The rules of the contest provided that the scripts were to have as their theme:

> Any interesting incident, character, or event in the history of the United States which will serve to interpret, dramatize, or symbolize American principles and the political philosophy embraced in the Constitution of The United States of America, the Declaration of Independence, and in our traditional concept of democratic government. The author may use any period or event in the history of the United States from the discovery of America to the present day.

The committee's program is "to instill in the public, particularly in the youth, a positive and affirmative appreciation of, and faith in, the American way of life and our concept of justice". The script-writing contest is one of the main vehicles used by the committee to carry out its program.

■ The Fifth Annual Midwinter Institute sponsored by the Minnesota Bar Association was held on Friday and Saturday January 21 and 22 at the Nicollet Hotel in Minneapolis. A panel demonstration on "How To Settle a Lawsuit" was presented by Louis G. Davidson, of Chicago, and Joseph M. Sindell, of Cleveland, for the plaintiff and Fred M. Garfield, of New York, and Truman B. Rucker, of Tulsa, for the defendant. The moderator was Sidney P. Gislason, of New Ulm.

An expert consultation program under the direction of the Special Committee on Consultants, of which Judge Andrew Glenn, of St. Paul, is Chairman, was available to those lawyers who attended the Institute.

■ The first issue of "Bar Blueprints" under the sponsorship of the Committee To Cooperate with Bar Associations of the New York State Bar Association appeared in November, 1954. Present plans call for its distribution to local bar association officers two or three times a year.

"Bar Blueprints" is a brief, informative report on activities of both state and local bar associations and their committees. The intention of the editors is to suggest worthwhile professional and public service programs and to supply information concerning what is happening in organized bar work throughout the country.

Attorney for the Government

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pensations here; among these are the opportunities for association with able high-minded men in the office and elsewhere in the Department of Justice.

I prize a letter which I received from William Marshall Bullitt who was Solicitor General in President Taft's Administration—over forty years ago. This is what he wrote me:

> If a lawyer desires only professional work, there is not an office in the country, state or national, that is to be compared with the Solicitor General, in the range of subjects to be considered and studied, and in the rare opportunity to argue great cases before the Supreme Court under the most favorable conditions as the representative of the Government.
>
> It will bring you into relation with that great Court and its Members in such a way as to color the rest of your professional life.

If the possibilities of this office are to be realized, the incumbent must strive to learn the meaning of the process he seeks to guide. He must try to discover the social tensions, the reverberations of strife and passion, the political issues, the clashes of interest that are dressed up in technical legal forms. With what wisdom he can muster he must endeavor to foresee the consequences of his acts upon the future course of the law. What is the essence of it all? What spirit can be perceived that stirs this variegated mass of litigation? What does it signify and what does it portend, for good or ill? As the lawyer for the Government and as an officer of the court acting within the proper limits of his special function, his constant endeavor must be, without falling prey to his own fetishes but obedient to the legislative policy laid down by others, to channel this mighty stream so as to strengthen the foundations of our society, to make freedom more secure and to promote justice between man and man and between the Government and its citizens.

The Law, the Facts and the Record

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may be misconstrued by the courts, but it is nevertheless the function of industrial commissions to administer the laws as enacted by the legislatures and interpreted by the courts. The record should show a sincere attempt on the part of the commission to follow the law, not reluctantly, not critically, but faithfully and judicially. A reluctance to abide by the law is just as culpable in administrative bodies as in individuals. Obedience to law with reluctance is just one step removed from disregarding the law entirely.

Propinquity is probably responsible for the occasional tendency of those in charge of the administration of any law to feel that they have the right to take liberties with that law. Or, perhaps it is the almost universal tendency for officeholders to feel that skill and experience are conferred by election or appointment. Or, possibly there is a slight tendency for anyone elected or appointed to a public office to become convinced that he is the one person in the universe qualified to perform the functions of that office. It seldom occurs to some officeholders that the position itself confers the semblance of competence. While a position cannot transform a mediocrity into a genius, it can create a magnificent illusion. There are no stupid kings until dead or deposed.

As a matter of fact, comparatively few governmental jobs are held by the only people qualified or by the best qualified. Actually this is a fortunate situation, for it is the hallmark of democracy. Only a genius—an evil genius—can make despotism work. The perpetuating characteristic of a democratic form of government is its capacity for running exceedingly well even with inexpertness at the steering wheel.

In applying the law to the facts in a particular situation an industrial commission should be governed by the law as enacted. If under the law as enacted by the legislature compensation should be denied, it is the duty of the commission to deny compensation. True, the law should be liberally interpreted, but liberality of interpretation does not justify the imposition of compulsory charity on the part of employers and insurance carriers. To compel an insurance carrier to pay compensation to an injured employee when there is no liability under the law is simply a form of extortion which defies proof and punishment. Larceny for the benefit of a third party is just as wrong as larceny for one's own benefit.

In summary, then, by contents and spirit the commission's record should proclaim to the courts that the commission held a fair and complete hearing, that the commission found the facts in accordance with the weight of the testimony, that the commission applied the law logically to the facts. The record should display a faithful, enlightened effort to administer the compensation act efficiently and impartially, but with constant appreciation of the beneficent nature of legislation enacted primarily for injured workmen and their dependents. The record should show wisdom in the performance of duties and humility in the exercise of powers.

Outstanding accomplishments in the future are presaged by marvel-

ous performances in the past. Industrial commissions are relatively newcomers in the governmental field. They were created to activate new and thrilling ventures in social legislation. And what splendid, sturdy pioneers they turned out to be! They absorbed completely the spirit of the legislation; they labored long, enthusiastically, unselfishly; they strode forward with boldness, determination and vision; and as a result they coerced an ideal into becoming a beneficent reality. They succeeded in spite of such handicaps as lack of tenure, insufficient trained personnel, political pressures. Indeed, the success of most compensation laws is a personal tribute to the men and women charged with their administration. Compensation acts will continue to be the pride of social legislation as long as industrial commissions and boards maintain their eagerness for service, their zeal for progress and their devotion to human welfare.

The Two Bulwarks of Liberty

(Continued from page 220)

by that clause of the Fourteenth Amendment forbidding a state to deprive any person of liberty without due process of law.

Justice Harlan further stated:

> It is . . . impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the Nation or by the States, which does not embrace the right to enjoy free speech and the right to have a free press.

Mr. Justice Brewer also dissented and said the Court should have given greater consideration to the constitutional defense set up by Senator Patterson.

Ten years later came the *Toledo Newspaper* case—the great "reasonable tendency" case. It brought into full focus the controversial words in the federal statute of 1831 that a contempt to be punishable had to be committed in the presence of the court "or so near thereto" as to obstruct the administration of justice.

The facts in the *Toledo* case were that there was a bitter public utility controversy during which a Toledo newspaper criticised the manner in which a federal judge handled proceedings incident thereto in his court. Various citations for contempt were issued by direction of the court against the newspaper and its editor for publications made concerning this proceeding.

Convictions resulted and heavy penalties were inflicted. The Supreme Court affirmed on the ground that the 1831 statute was properly construed.

Mr. Justice Holmes dissented and said:

> . . . a judge of the United States is expected to be a man of ordinary firmness of character and I find it impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty. I am not considering whether there was a technical contempt at common law, but whether what was done falls within the words of an act intended and admitted to limit the power of the courts.

Mr. Justice Holmes quoted from the opinion of the trial judge in justification of his judgment, wherein the trial judge complained about enduring the newspaper attacks upon the court for a period of nearly six months before moving to vindicate his independence.

This, said Mr. Justice Holmes, was enough to show that there was no emergency, that there was nothing that warranted a finding that the administration of justice was obstructed or a resort to this summary proceeding.

The *Nye* case is important because in that decision the Supreme Court specifically overruled its decision in the *Toledo* case and gave a strict interpretation to the statute of 1831. That statute, the court said, was not merely to define, but substantially to curtail the power of federal courts to punish for contempt.

In the *Nye* case the alleged contempt occurred more than 100 miles away from the court. Mr. Justice Douglas, speaking for the majority, said:

> It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business.

He rejected the contention that the words "or so near thereto" in the 1831 statute be given a casual meaning and held that that phrase should be restricted to acts in the immediate vicinity of the court. Otherwise, he said,

> The conditions which Congress sought to alleviate in 1831 have largely been restored . . . [and] . . . that the offenses which Congress designated as true crimes will be absorbed as contempts wherever they may take place.

Bridges v. *California* actually consisting of two cases,[18] followed closely on the heels of the *Nye* case. In one case the court reviewed and reversed the conviction for contempt of Harry Bridges, the notorious West Coast labor leader, incident to publication of a telegram he sent to the Secretary of Labor criticizing an injunction issued by a California court in a labor controversy and threatening to tie up the port of Los Angeles if the state court were allowed to overrule the wishes of his organization.

In the other case, the court reviewed the conviction of the *Los Angeles Times* and its editor, L. D. Hotchkiss, on charges of contempt because of the publication of editorials in the *Los Angeles Times* alleged to have had a tendency to interfere with the administration of justice by the Superior Court of Los Angeles County.

The newspaper case was not even initiated by the Los Angeles court, but by a bar association committee after a systematic study of editorial

18. *Bridges* v. *California* and *Times-Mirror Co. and L. D. Hotchkiss* v. *Superior Court of California*, 314 U.S. 252 (1941).

comment in the *Los Angeles Times* over a long period of time. No judge of the court, no public official was a party to the institution of the proceedings. After they were filed and the citations issued, the court permitted the attorneys for the bar association to prosecute them over the protests of the respondents.

A second proceeding was instituted by the bar association when the *Times* editorially defended its right to comment on the matters resulting in the first.

After conviction by the trial court and affirmance by the Supreme Court of California,[19] the matter came on to the Supreme Court of the United States.

The approach of the majority of the Supreme Court to the issue before it in the *Bridges* case must be carefully noted. Mr. Justice Black began his opinion by emphasizing that the Court was passing upon the exercise of power by a judge which had been upheld by the highest court of the State of California—a reviewing function of a delicate nature. But California had not declared a legislative policy to punish contempts of the sort here involved. On the contrary, the only manifestation was a statute which in terms narrowly limited the power and ran afoul the California Constitution. On the facts of the case, therefore, the Supreme Court was dealing with convictions for contempt based upon "a common law concept of the most general and undefined nature".

Since the California legislature had not declared that publications in situations like the *Times-Mirror* case create a specific danger sufficiently imminent to justify restraint by judicial decree, the Supreme Court was free to decide as an original question whether the words of the publication were used "in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils" of disrespect for the judiciary and unfair administration of justice. But, said the Court, the evil itself must be substantial and it must be serious; and so

> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.

Nothing is more significant in the majority opinion than this recognition of the "clear and present danger" standard as a "minimum compulsion of the Bill of Rights", and not as marking "the furthermost constitutional boundaries of protected expression". First utilized in cases arising under the federal espionage laws,[20] the "clear and present danger" test was subsequently applied by either a majority or minority of the Supreme Court in cases involving state criminal syndicalism[21] and anti-insurrection laws[22]; and more recently it had been extended by the Court to breaches of peace at common law[23] and to picketing in labor disputes.[24]

So far as contempt by publication is concerned this means that the Court has definitely rejected the doctrine that judicial power in that sphere may be validly exercised whenever a publication is deemed to have a "reasonable tendency" to interfere with the orderly administration of justice in pending controversies. The "reasonable tendency" test was the basis upon which the judgments of conviction were affirmed by the California Supreme Court in the *Times-Mirror* case and it was also the ground upon which other state courts had rested convictions.

The correctness of the court's adoption of the "clear and present danger" test can be appreciated only in the light of the historical background of the First Amendment and its interpretation by the Supreme Court.

Mr. Justice Black aptly observed:

> . . . the First Amendment does not speak equivocally. It prohibits "any law abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.

This is undoubtedly the true historic concept of the guarantee.

The historical evidence is overwhelming in support of the Court's conclusion that the purpose of the Bill of Rights was to secure to the people of the United States greater fundamental rights than the people of Great Britain enjoyed, including an enlargement of the concept of freedom of the press. As stated by the majority of the Court:

> . . . the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.

And that

> . . . one of the objects of the revolution was to get rid of the English common law on liberty of speech and of the press.

Mr. Justice Black spoke on the importance of information about trials. He said:

> No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. . . .
>
> An endless series of moratoria on public discussion . . . could hardly be

19. *Times-Mirror Co. and L. D. Hotchkiss* v. *Superior Court of California*, 15 Calif. 2d 99; 98 P. 2d 1029 (1940).
20. *Schenck* v. *United States*, 249 U.S. 47 (1919).
21. Concurring opinion in *Whitney* v. *California*, 274 U.S. 357 (1927).
22. *Herndon* v. *Lowry*, 301 U.S. 242 (1937).
23. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).
24. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

dismissed as an insignificant abridgment of public discussion.

In *Pennekamp* v. *Florida,* the Supreme Court reviewed the convictions of contempt in the cases of John D. Pennekamp, editor of the *Miami Herald,* and that newspaper. The citation charged that two editorials and a cartoon published in the *Herald* reflected upon and impugned the integrity of the court and tended to prejudice fair and impartial action by it.

Florida by statutory action had declared the English common law applicable to contempt as of July 4, 1776, of force in that state. Also it vested authority in the Florida courts to punish contempts.

When this case reached the Supreme Court, it weighed the danger of coercion and intimidation of courts by newspaper criticism against the right of free speech.

In concluding his opinion for a unanimous Court, Mr. Justice Reed said:

> . . . We must weigh the impact of the words against the protection given by the principles of the First Amendment as adopted by the Fourteenth, to public comment on pending court cases. We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all doors behind it.

Craig v. *Harney*[25] followed *Pennekamp* v. *Florida.* Again, the Court reversed a conviction for contempt by publication, saying: "The danger must not be remote or even probable; it must immediately imperil."

In the *Baltimore Radio Show* case the issue was whether by a rule of court the press could be prohibited from printing information concerning certain phases of certain types of judicial proceedings by threat of punishment for contempt. For years the Baltimore newspapers were subjected to the strictest form of censorship by the vigorous application of Rule 904 of the Criminal Court of that city. Then several summers ago the rule ran into headlong conflict with the public interest. Two girl children were murdered by a sex maniac, one in a public park in Washington, D. C. and the other a few days later in Baltimore. The citizens of both cities were aroused. Finally, the Baltimore police landed the loathsome fiend who promptly confessed. His confession was made known to the press. But the Baltimore newspapers, coerced by Rule 904, dared not divulge to the public that the killer had been arrested, had confessed to his crimes and that small girls were safe from his further attacks. The Washington newspapers printed the facts and Baltimore radio stations broadcast a press association account of the arrest and confession. These stations were promptly charged with contempt for violating Rule 904 and convicted upon trial.

Upon appeal, the convictions were reversed by the Court of Appeals of Maryland on the authority of *Bridges* v. *California, Pennekamp* v. *Florida,* and *Craig* v. *Harney.*

Subsequently, the Supreme Court of the United States denied the petition of the State of Maryland to review the decision of its highest court.

The importance of this case is to be found in the holding that what a court cannot do under the discredited common law concept of power to punish publications as contempt, it cannot do through the device of a rule of court designed to restrict information concerning judicial proceedings therein.

No discussion of these contempt cases I have referred to would be complete without reference to *Near* v. *Minnesota.*[26] It was in this decision that the Supreme Court reappraised the guarantees of free speech and of a free press in the light of their historical background and spelled out the rule of subsequent punishment, rather than restraint or threat of restraint, as the appropriate remedy for dealing with abuses by the press.

Near v. *Minnesota* pointed the way to the reversal of the *Toledo Newspaper* case in the *Nye* decision and to a return to the original concept of free speech and a free press found in its opinions in the *Bridges* and *Pennekamp* cases.

The checkered history of the exercise of the contempt power in American courts brings into full focus the ever-continuing conflict between those who believe in a people's right to have information free from censorship by government or anyone holding office therein and those who believe a people should receive only that information which men in authority think they should have.

It is the conflict between the ideologies of freedom and totalitarianism.

Today, in this country and all over the world, people want to know what is going on. As stated by a great Argentine editor whose newspaper was silenced in 1951 by the dictator Peron:

> Their need is legitimate and imperative. It is the duty of newspaper men to satisfy it. If we fail, if we complacently accept limitations imposed on the people's right to know what is going on, then their other rights are condemned to disappear too.[27]

The events of the last half century have recorded the disappearance of individual liberty in Europe, in Asia, in South America, and most recently in Central America. The disappearance in each country has been preceded by the destruction of those two great bulwarks of liberty, a free and independent press, and an independent and courageous judiciary. A fair trial cannot be had in a totalitarian court. A free press cannot exist in a totalitarian country. Liberty and restraint can never be reconciled. Either one or the other must prevail in the never-ending conflict between them.

So long as the press in America is vigilant in asserting its right to gather and disseminate information free from restraint by men in government and so long as our courts recognize the right of the people to have a press free from such restraint, just that long and no longer will we of this country continue to enjoy individual liberty.

25. 331 U.S. 367 (1947).
26. 283 U.S. 697 (1931).
27. In address of Dr. Alberto Gainza-Paz, Editor of *La Prensa,* before American Newspaper Publishers Association, April 23, 1952.

A Panorama of Law Office Practice

(Continued from page 216)

today. He had stumbled onto the principle modern lawyers call "interim billing". By using the technique of interim billing, the lawyer eases the financial burden of legal services on his client, as well as the tax burden on the lawyer in the case of long-term services. Practice also demonstrates that the lawyer often gets a larger total fee in cases because of interim billing, than he ever could by a single, final ego-inflating bill. From the client's standpoint this practice is a wise one. He always knows just about what the lawyer's services are costing him—no small item in his thinking and in his ultimate satisfaction or dissatisfaction.

Preventive Law . . . *A Recent Development*

The twentieth century has seen the extensive development of preventive medicine. It has also witnessed a movement away from litigation. Business firms, corporations and individuals are beginning to see the value of preventive law, just as they have accepted the merit of preventive medicine.[30] Still, trial lawyers and advocates will always be needed. Great advocates will always have their place in the law. Even in England, barristers only comprise about five per cent of the legal profession.

> Ninety-five percent of all the work done by lawyers is in England done by solicitors. With the very rarest exceptions, all American lawyers are really solicitors, and this goes even for most American lawyers who call themselves litigators, for the litigator spends a major part of his time interviewing witnesses and generally preparing cases in a way that in England is also reserved for the solicitor.[31]

Whether the young lawyer chooses to be an "office lawyer" or to be an "advocate" is largely a matter of his own qualifications and tastes. Like the question of whether he should practice solo or in a firm, that question demands some real soul-searching—and merciless self-analysis.

Preventive law, like preventive medicine, offers great opportunities to advise clients on avoiding legal pitfalls. Two very common cases are advising a client to make a will and to secure legal advice before signing a real estate contract. Estate planning, including lifetime gift planning, is a more modern development. Its aim is to preserve as much as possible of a decedent's estate for his beneficiaries after his death—and the payment of estate and inheritance taxes! An employer's lawyer can often forestall labor troubles for his client by sound legal advice on labor relations matters. The same is true of tax problems. The subject of preventive law is an ever widening one, and the day of the "old family solicitor" is far from past.

Americans are not noted for being a submissive lot. After all, their history as a nation begins with a Declaration of Independence and a Revolution. Such a nation might be expected to be difficult to control as legal clients! What then should the lawyer's attitude be toward his clients? What control should he exercise over them?

The lawyer should always be dignified and respectful toward those who seek his legal counsel. He should also see that he deserves—and gets—respect in return. A lawyer should not let his client override the lawyer's judgment on principles or persuade him to take unconscionable or unjust action against any party or brother counsel. Nor should a lawyer let his client force the lawyer to take any legal action which the lawyer believes is against the client's best interests. If the client stubbornly insists—put yourself on record in writing as having advised him against the course he persists in following. If your own advice is sound, you should be willing to stand by it! John Evarts Tracy tells a story from his own experience which illustrates the point well.

> A large firm of lawyers with which I was associated had a client, the head of an investment banking firm who was very arbitrary and opinionated. He always knew what he wanted to do and was furious at any attorney who undertook to advise him to the contrary. Many a time I have seen him storm out of the office saying, "I didn't hire you fellows to tell me I can't do things. I come to you for constructive service. If I can't get it here I know where I can." For some reason, however, the client continued to stick to us and one day when I was travelling with him I learned the reason. Our firm had just acquired a very brilliant and experienced lawyer and we were very proud of his abilities and of the work which he had been doing, particularly certain work for this client. I expressed this to the client and he replied, "Do you know, I am not so certain about that. I am somewhat scared at the manner in which he lets me have my own way. I realize I am bull headed and opinionated. I get furious when you fellows tell me I cannot do a certain thing, so I tell you I am going to change lawyers. That is no idle threat. I mean every word of it at the time, but the next morning I realize that I come to you because you know more than I and it would be foolish of me not to follow what you feel to be sound advice. When Blank lets me do what I want I am scared that he may be

30. See, *e.g.*, Maddock, *The Corporation Law Department*, 30 HARVARD BUSINESS REVIEW 119 (No. 2, March-April, 1952).
31. Whitney, *Inside the English Courts*, 3 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, at page 367.

letting me do what I ought not to do![32]

How much control should a lawyer exercise over his client's will and estate planning? Certainly there is no definitive answer. The will itself should be the client's will, and not the lawyer's. The client should be advised against including void provisions; cautioned against unnatural, eccentric or vengeful provisions. The inclusion of libelous statements in the will can result in liability to the testator's estate after the will has been probated.[33] Wills which invite litigation are of questionable value. When a person other than the testator consults the lawyer concerning the making of a will for the testator, the lawyer must take care to be sure which is his client. In cases where bequests are made to a lawyer by his client, the lawyer should give his client the benefit of another lawyer's completely independent counsel and advice. In such case the will should be drafted and its execution supervised by another lawyer. Failure of the lawyer who is the beneficiary of his client's estate in such cases to observe punctiliously and scrupulously the nicest decorum will only redound to his discredit.[34]

A Question of Ethics... *The Lawyer as an Executor*

On the other hand, there is no objection whatever to the lawyer witnessing his client's will or suggesting to the client that the lawyer's office is a safe and proper place to keep it. Such practice is accepted, is not unethical and has been generally followed both in England and America. The fact that the lawyer makes this suggestion in the hope of future employment as counsel for the testator's estate does not render his action improper. However, an unsolicited, voluntary request or suggestion by the lawyer to his client that the lawyer be named as executor in the will is unethical. If the client voluntarily requests the lawyer to act as executor, it is neither unethical nor improper to accept.

Lawyers often remark that the people they have the most trouble with are their own clients. That is understandable. The lawyer's primary function is to look for the pitfalls in a proposed course of conduct. He is trained to do this by his legal education, his experience and his developed habits of thought. The businessman is usually trained to take risks and often makes decisions under the twin pressures of time and competition. Yet the lawyer's function is not to prevent business deals, but to show his client how and to what extent he can accomplish his purpose—within the law.

An Example for Lawyers... *Elihu Root and His Clients*

One of Elihu Root's clients reportedly observed, "I have had many lawyers who have told me what I cannot do; Mr. Root is the only lawyer who tells me how to do what I want to do."[35] This did not mean Root was a clever, crafty lawyer who successfully devised legal forms to accomplish essentially immoral or illegal purposes for his clients. "The exact contrary is the truth. Root is the type of lawyer who, knowing the law and seeing the very right of the matter, advises his clients in accordance therewith, and insists upon his clients following his advice so long as the relation between them continues."[36]

Clients who retain counsel, however, do not expect *their* lawyer to act like an impartial judge. They want an advocate and adviser. A lawyer who represents a client does not often have the chance to deal with his client's affairs with impartial fairness. "An impartial lawyer, devoted to the objective pursuit of truth, is indeed, from the point of view of clients, distinctly undesirable, and from the point of view of the Bar, shockingly irregular."[37] The advocate is by necessity and by definition a partisan. The client wants, and the Bar expects the advocate to be partisan. The role of impartial arbiter is the role for the judge on the Bench, not the advocate at the Bar. Those are the major premises upon which our system of justice has been established. History and experience prove their merit in the search for and discovery of truth. Yet the lawyer should ponder carefully the following observation by Federal Judge Wyzanski. Pointing out that a lawyer not only advises his client on what is legally permissible, but also upon what is desirable, the Judge continued:

> And it is in the public interest that the lawyer should regard himself as more than predicter of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political, and philosophical considerations.[38]

On the other hand, if a client persists in wrong-doing the lawyer should terminate their relationship.[39]

The Lawyer's Duty . . . *An Officer of the Court*

A lawyer is an officer of the court. "It is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane."[40] Therefore the lawyer is not justified in advising his client to undertake questionable transactions. No client is entitled to receive "any service or advice involving disloyalty to the law".[41] The lawyer is obligated to "observe and advise his client to observe the statute law".[42] It is therefore highly improper for a lawyer to advise his client to refuse to comply with the order of a court. If the lawyer believes the court's order is unconstitutional or illegal, the law already provides the remedy—an appeal. When the last appeal has been taken and the order

32. Tracy, THE SUCCESSFUL PRACTICE OF THE LAW, pages 16-17. See Trachtman, *Lawyers' Desk-side Manners*, 59 CASE AND COMMENT 3 (No. 3, May-June, 1954).
33. See *Kleinschmidt* v. *Matthieu*, 266 P. 2d 686 (Oregon, 1954).
34. *In re Wharton's Will*, 270 App. Div. 670, 62 N.Y.S. 2d 169, affd., 296 N. Y. 671 (1946).
35. I Jessup, ELIHU ROOT (New York: Dodd Mead & Company, 1938), page 185. See also page 281. See also *id.* Volume 2 at 111.
36. Samuel B. Clarke to Joseph H. Choate, November 17, 1908, as quoted in I Jessup, ELIHU ROOT page 186.
37. Mason, Brandeis: A FREE MAN'S LIFE (New York: The Viking Press, 1946), page 53.
38. *U. S.* v. *United Shoe Mach. Corp.*, 89 Fed. Supp. 357 (1950), at 359. See address by William T. Gossett, General Counsel of the Ford Motor Company, entitled, "The Law and Group Ethics". It is reprinted in 3 UNIV. OF CHI. L. SCH. RECORD 6 (No. 1).
39. Canons of Professional Ethics, No. 16.
40. Canon No. 15. See also Canons 31 and 32.
41. Canon 32.
42. *Ibid.*

upheld, there is only one course open to the lawyer and to his client. Obey the law! Any lawyer who would advise otherwise is undermining the very foundations of his own profession and his own government. The lawyer should advise his client to obey the law. However, before a statute has been construed by competent adjudication, Canon 32 says the lawyer "is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent."[43] "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted", said Mr. Justice Sutherland in *Gregory* v. *Helvering*.[44] The line is drawn between avoidance by means which the law permits and evasion which the law does not permit. Schemes which exalt artifice above reality are likely to run afoul of the law. The lawyer is wise therefore to learn where that line is drawn before he pushes his client into some super-clever scheme which may cost more in the end than the taxes which were to be avoided.

It is improper for a lawyer to advise his client to institute any action which requires the client to deceive the court, whether the court is that of his own or another state. Such questions sometimes arise in connection with Mexican or Nevada divorces, and especially with the residence requirements of those jurisdictions.[45]

The conduct of the lawyer both before courts and with his fellow members of the Bar should be characterized by candor and fairness. "It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes."[46]

One of the problems which faces every lawyer is whether he is obliged to speak on certain occasions. Doctors will say that the physician must treat both a patient's mind and his body, because under present-day views of psychosomatic medicine, body and mind are closely interrelated. Doctors therefore do not regard the withholding of information from patients as unethical, if that information would have an adverse effect on the patient's health if revealed.[47] Lawyers have been faced with the same type of problem. Samuel Williston, the great authority on contracts, has recorded such an instance in his own trial experience.[48] Charles P. Curtis, of Boston, has said, "I don't see why we should not come out roundly and say that one of the functions of a lawyer is to lie for his client; and on rare occasions, as I think I have shown, I believe it is. Happily they are few and far between, only when his duty gets him into a corner or puts him on the spot. Day in, day out, a lawyer can be truthful as anyone. But not ingenuous."[49] That is an extreme view from which most lawyers would dissent.[50] The Lawyer's Oath of Admission states: "I will maintain the confidence and preserve inviolate the secrets of my client." The law therefore clearly recognizes this privilege of non-disclosure extended to attorneys.[51] The Supreme Court has sustained the importance of this privilege in a case where a lawyer was willing to go to jail rather than violate the confidences of his client![52]

The charge is often made that an advocate cannot be a sincere and honest man in his daily business because the advocate argues for cases in which he does not believe or for clients whom he "knows are guilty". Lord Macmillan met that indictment head on when he said:

> In ordinary life what a man says is presumed to be and ought to be the honest expression of his own beliefs, and those whom he addresses are entitled so to understand. What the plain man finds it difficult to appreciate is that in advocacy what the advocate says is not presumed to be, and ought not to be, the expression of his own mind at all, and those whom he addresses are not entitled to believe, and do not believe, anything of the sort. In pleading a case an advocate is not stating his own opinions. It is no part of his business, and he has no right to do so. What it is his business to do is to present to the Court all that can be said on behalf of his client's case, all that his client would have said for himself if he had possessed the requisite skill and knowledge. His personal opinion either of his client or of his client's case is of no consequence. It is the business of the judge or the jury to form their opinion of his client and his client's case. It is not for the counsel himself to prejudge the question at issue. His duty is to see that those whose business is to judge do not do so without first hearing from him all that can possibly be urged on his side.[53]

43. *Cf.* Curtis, LIONS UNDER THE THRONE (Boston: Houghton-Mifflin Company, 1947), page 188.

44. 293 U. S. 465, 79 L. ed. 596, at 599.

45. Opinions of the Committee on Professional Ethics and Grievances, published by the American Bar Association, Opinions Nos. 84 and 248.

46. Canon 22.

47. See *e.g.*, Steincrohn, THE DOCTOR LOOKS AT LIFE (New York: Greystone Press, 1952), pages 277-78; Hutschnecker, THE WILL TO LIVE (New York: Thomas Y. Crowell Company, 1952), Chapters 10 and 11. "In prognosticating the course of an illness a physician should neither minimize nor exaggerate the gravity of the patient's condition. He should make sure that the patient and his friends have such knowledge as will serve the best interest of the patient and the patient's family." Aach, *Medical Ethics*, 27 THE TORCH 8 (No. 1, January, 1954), at page 9.

48. Williston, LIFE AND LAW (Boston: Little, Brown & Company, 1941), pages 271-72.

49. Curtis, *The Ethics of Advocacy*, 4 STANFORD L. REV. (No. 1, December, 1951), at pages 7-8.

50. See Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy,"* 4 STANFORD L. REV. 349 (April, 1952). Mr. Drinker states categorically: "A lawyer need never lie for his client." *Ibid.* See also, Macmillan, *The Ethics of Advocacy*, in LAW AND OTHER THINGS, (Cambridge: Cambridge University Press, 1938) 171, at 179 *ff.*, and page 193.

51. See *e.g.*, N. Y. Civ. Prac Act, §353.

52. *Hickman* v. *Taylor*, 329 U. S. 495, 91 L. ed. 451 (1947).

53 Macmillan, *The Ethics of Advocacy*, in LAW AND OTHER THINGS, at page 181.

Dr. Johnson endorsed that same opinion to lawyer James Boswell in a more amusing way. Said Johnson:

> Everybody knows you are paid for affecting warmth for your client; and it is, therefore, properly no dissimulation: the moment you come from the bar, you resume your usual behaviour. Sir, a man will no more carry the artifice of the bar into the common intercourse of society, than a man who is paid for tumbling upon his hands will continue to tumble upon his hands when he should walk on his feet.[54]

Certainly it is unethical for the lawyer to make a misstatement of a known fact—to lie—for any client. A lawyer does not always have a duty to speak.[55] He can therefore quite properly in response to questions asking information he does not feel entitled to reveal, reply: "If I knew, my duty as a lawyer would forbid my telling you."[56] If a young man feels he must be a liar to be a lawyer, he had better follow Lincoln's advice and "choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave".[57]

Oppressive Tactics . . . "*Reprehensible Conduct*"

Stirring up strife and litigation is unprofessional conduct in a lawyer. Champerty and maintenance were indictable offenses at common law. The institution of "strike suits" against corporations on behalf of minority stockholders whose sole motive is to be bought off is unprofessional. Making "nuisance claims" against estates where the claim has no merit to secure a cash settlement is equally oppressive and unprofessional.

Another form of oppressive tactics by lawyers is newspaper discussion of pending litigation. Generally such tactics are to be condemned.[58] Furnishing or inspiring newspaper comments to be published in connection with causes in which the lawyer has been or is engaged, or about the magnitude of the interest involved, offends and lowers the standards of the legal profession. Canon 27 calls such conduct "reprehensible".[59]

Most lawyers are today aware of the impropriety of sending letters threatening criminal prosecution, especially if the purpose of the letter is to collect a debt. Such conduct violates the penal laws of many states.[60] An attorney may be guilty of violating these statutes because a lawyer in attempting to collect a just debt can claim no special privileges to threaten criminal prosecution. The law does not authorize the collection of debts by the use of threats to accuse the debtor of crime or disgrace unless he pays up.[61]

The attorney-client relationship is one of trust and confidence, a fiduciary relationship. Employment as attorney, once assumed, should only be discontinued by mutual agreement or for just cause. The lawyer should not throw up the unfinished task to his client's detriment "except for reasons of honor or self-respect".[62] Such reasons include the client's insistence on an unjust, illegal or immoral course of conduct, the insistence on frivolous claims or defenses, deliberate disregard of his obligations as to the expenses and fees agreed to be paid, and similar conduct. Withdrawal should only be upon due notice to the client.

Advocacy has been called the "harlot of the arts" and "the most meretricious form of rhetoric".[63] The common man arraigns the advocate with the charge that the advocate cannot believe all his clients to be always right and therefore he must have to act in many cases in which he does not believe—proving that white is black and black is white—according to the fee he is paid. The explanation is found in a complete misconception laymen have of the role of advocate. Lord Macmillan's explanation supplied the irrefutable answer, as we have seen.[64]

So far, so good. But what of the case where the defendant confesses his guilt to his lawyer during the trial itself? What is the advocate's duty now? Should he throw up the case regardless of the adverse effect of his action on his client? The English barristers have reached a satisfactory solution. Here it is:

> In actual experience the problem of defending a man you know to be guilty seldom arises. But, to test the matter, let me figure an extreme case where a client accused of a crime confesses his guilt to counsel. Personally, on one aspect of counsel's duty, I entertain no serious doubt. The law constrains no man to become his own accuser, and nothing which counsel may learn in confidence would justify him in taking such action as might tend to incriminate his client. For example, if a sudden withdrawal from the case would tend in this direction, then, in my judgment, counsel should avoid taking that step. The English Bar Council have laid down rules for the guidance of barristers in this situation. They distinguish between the case where the confession is made to counsel before the trial and the case where it is made during the trial. In the first case they state, "It is most undesirable that an advocate to whom a confession of guilt has been made should undertake the defence as he would most certainly be seriously embarrassed in the conduct of the case, and no harm can be done to the accused by requesting him to retain another advocate." In the second case, where the confession is made during the trial, counsel's withdrawal would seriously prejudice the position of the accused. In that case the Bar Council consider it right for the advocate to continue to act for the de-

54. I Boswell, LIFE OF JOHNSON (Ingpen ed.; Bath: George Bayntun, 1925), page 330.

55. Pollock wrote to Holmes that he "never heard of any real authority for any such proposition as that one owes full disclosure of the truth to all men at all times." Howe, HOLMES-POLLOCK LETTERS, Volume 2, page 225, letter dated July 2, 1928. And see Williston, LIFE AND LAW, page 272.

56. See Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy"*, 4 STANFORD L. REV. (April, 1952), at page 351.

57. *Notes for a Law Lecture*, 2 Nicolay and Hay, COMPLETE WORKS OF ABRAHAM LINCOLN (New York: Francis D. Tandy Company, 1894), page 143.

58. Canon 20.

59. One technique used by some lawyers is to file the pleadings in the county clerk's office prior to the time of trial, but after the trial jury list has been picked. Then a newspaper reporter is alerted by the lawyer to the fact that the papers are on file. This covert attempt to cover his tracks does not disguise the fact that the obvious and intended purpose of this ruse is to influence the prospective jurymen and to advertise the lawyer's abilities. In a proper case opposing counsel should move to set the case over the term on the ground that the jurors have been prejudiced. See Opinions Nos. 42 and 140 of the Committee on Professional Ethics and Grievances of the American Bar Association.

60. See 2 WHARTON'S CRIMINAL LAW (1932 ed.) § 2006; N. Y. Penal L. § 551.

61. *People* v. *Wickes*, 112 App. Div. 39, 98 N.Y.S. 163, 170 (1906); *People* v. *Loveless*, 84 N.Y.S. 1114 (1903) It makes no difference that the person threatened has committed the crime of which he is threatened to be accused. *People* v. *Eichler*, 26 N.Y.S. 998 (1894).

62. Canon 44.

63. Philip, *The Art and Ethics of Advocacy*, THE ACCOUNTANTS' MAGAZINE (January-February, 1947), page 1.

64. Macmillan, *The Ethics of Advocacy* in LAW AND OTHER THINGS, page 181, quoted *supra*, note 53.

fence by taking "any objection to the competency of the Court, to the form of the indictment, to the admissibility of any evidence, or to the sufficiency of the evidence admitted." But "it would," they add, "be absolutely wrong for the advocate to suggest that some other person had committed the offence, or to call any evidence which he must know to be false having regard to the confession."[65]

American lawyers can follow the English rule without fear of violating either legal ethics or their conscience.

It is the lawyer's duty to disclose fully to his client at the time he is retained all the relevant circumstances of his relationship to the parties which might affect the client in his choice of counsel. "It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts."[66] It is a wise lawyer who follows the Scriptural admonition that "No man can serve two masters."

In his dealings with his client the lawyer is bound to perform his duties with fidelity and with reasonable care and skill. If the lawyer fails in the performance of his duties, he may become personally liable to his client for loss the client suffers whether it be from the lawyer's fraud, negligence or failure to perform an obligation imposed upon him by his contract or by the law.[67]

A great Supreme Court Justice once remarked that "A lawyer learns most of his law at the expense of his clients. No matter what his preparation is, he isn't much when he starts practicing and he either learns, or he doesn't learn from then on." Perhaps the courts have taken that view! It is well settled that an attorney who acts in good faith and in an honest belief that his advice and his acts are well founded and in the just interests of his client is not answerable for a mere error of judgment. He is not an insurer or guarantor of the soundness of his legal opinions, or of the successful outcome of his client's litigation, or of the validity of instruments he drafts.[68] He is liable, however, for his ignorance or non-observance of the rules of his own courts, or the statutes and decisions of his own state.[69] He is accountable for monies he collects for his client and for the acts of his partners, his assistant attorneys and of his clerks.[70] Today, many lawyers, like many doctors, carry malpractice insurance to cover such contingent liabilities.

Such is our panoramic view of the law—a view too brief, indeed, to demonstrate fully the depth, the honor and the nobility of our great profession. The law is a calling in which study is a lifetime pursuit. Story was certainly right when he said, "I will not say, with Lord Hale, that 'The law will admit of no rival, and nothing to go even with it;' but I will say, that it is a jealous mistress, and requires a long and constant courtship. It is not to be won by trifling favors, but by lavish homage."[71]

All lawyers do not attain their full growth. Many of them never catch a glimpse of what Holmes called "the snowy heights of honor". But those who do may attain greatness in the law in their service to their clients and their country.[72] Such men will gladly devote their lifeblood and their lives to the attainment of those noble ideals of the law. Those ideals were eloquently summarized in his lawyer's creed by Mr. Justice Jackson in speaking on the occasion of the laying of the cornerstone of the American Bar Center in Chicago in 1953.[73] He closed his address on that significant occasion with this story:

> A visitor at a cathedral under construction questioned three workmen as to what they thought they were doing. The first muttered, "I am making a living." The second gave the uninspired reply, "I am laying this stone." The third one looked up toward the sky and his face was lighted up by his faith as he said, "I am building a cathedral."
>
> What are we doing today? We are building a cathedral to testify to our faith in the rule of law.

65. Philip, *The Art and Ethics of Advocacy*, THE ACCOUNTANTS' MAGAZINE, (January-February, 1947), at page 5.
66. Canon 6.
67. 5 Am. Jur., Attorneys at Law, §§ 120 ff.
68. *Id.*, § 126.
69. *Id.*, § 127.
70. *Id.*, §§ 131 and 134.
71. Story, *Value and Importance of Legal Studies*, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY (Boston: Charles C. Little and James Brown, 1852), page 523.
72. See Chief Justice Arthur T. Vanderbilt's excellent address to the American Law Student Association entitled "The Five Functions of the Lawyer," 40 A.B.A.J. 31 (January, 1954).
73. *The American Bar Center: A Testimony to Our Faith in the Rule of Law*, 40 A.B.A.J. 19 (January, 1954).

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